United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

326

18085

FILED

SEP 30 1963

HARRY M. HULL, CLERK

In the
United States District Court
For the District of Columbia

THE UNITED STATES OF AMERICA	
versus	Criminal Case No. 201-61
FRED L. SCOTT	

April 14, 1961

Washington, D. C.

No. 18085

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 1 1963

Nathan J. Paulson
CLERK

PROCEEDINGS BEFORE

THE HONORABLE DAVID A. PINE

Vol. I

Pages 1 through 71

Prepared for

Clerk of the Court

Patricia H. Miller

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA versus FRED L. SCOTT	Criminal Case No. 201-61

April 14, 1961

Washington, D.C.

The above-entitled matter came on for hearing before The HONORABLE DAVID A. PINE, a United States District Judge at 11:00 A. M.

APPEARANCES:

For the Government:

Harold L. Titus, Esquire

For the Defendant:

George A. Pope, Esquire

INDEX

EXHIBITS

PROCEEDINGS

THE DEPUTY CLERK: The case of the United States of America versus Fred L. Scott, Mr. Titus and Mr. Pope.

THE COURT: Mr. Clerk, swear the panel.

(After impanelling of the jury, the following took place in Open Court:)

MR. TITUS: May it please the Court and ladies and gentlemen of the jury, the indictment in this case charges and the Government expects to show that on or about February 20, 1961, here in the District of Columbia, Fred L. Scott, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting fear into, stole and took from the person and from the immediate actual possession of Kathleen J. Chairas, property of Kathleen J. Chairas of the value of about Ten Dollars consisting of the following: one wallet of the value of Five Dollars and Five Dollars in money.

And in the second count, that on or about the same day in the District of Columbia, the defendant, Fred L. Scott, without justifiable and excusable cause, did assault, resist, oppose, impede, intimidate and interfere with Robert Sandberg, a member of the Metropolitan Police Department operating in the District of Columbia while the said Robert Sandberg was engaged in the performance of his official duties.

These are the specific and technical words contained

in the indictment and in support of those the evidence will show the following facts: The evidence will show that on that date, February 20, 1961, Mrs. Chaimas, the complaining witness who was identified earlier, was shopping downtown in Northwest Washington.

The evidence will show that Mrs. Chaimas had been shortly before 11:30 in the morning at a store, I think a five and ten cent store known as Neisner's Store in Northwest Washington, D.C. and on that occasion, on two seperate instances defendant bumped up against her in the store. I think once on the first floor and the second time was when she was going downstairs or at the bottom of the stairs in the store.

The evidence will show that Mrs. Chaimas thought that was a little unusual but nothing happened and she continued her shopping. The evidence will show she went to the Hecht Department Store here at Seventh and E or Seventh and F Streets, here in Washington, D.C., and she proceeded to the Camera Department of that store on the First Floor. She was there in the process of making a purchase from the clerk of some camera equipment.

Now the evidence will show ladies and gentlemen of the jury that the clerk waiting on her in the Camera Department was a Sergeant Robert Sandberg, who was a member of the Metropolitan Police Department, and that he was working there on a part-time basis, in connection also in performing his regular police duties since he is on duty all hours of the day or

the night.

Now he was dressed in civilian clothes and he was waiting on Mrs. Chaimas and he had turned to her for a moment to check her credit. She was charging her purchases in the store. The evidence will show that Mrs. Chaimas was carrying at that time a purse, which was in effect, a music case, which was I believe, a little larger than a regular purse. She was standing at the counter and had placed her purse in front of her on the counter. In that purse was a wallet, a check book and other personal belongings of Mrs. Chaimas.

The evidence will show that Mrs. Chaimas, while the clerk, Sergeant Sandberg, was checking on her credit had turned briefly to the right and was looking to the opposite direction while the clerk was checking on her credit.

We will show the purse was still on this table, was still in her possession and under her domain, and she could reach it from the point where she was then standing.

The evidence will show that just at that moment she heard Sergeant Sandberg say: Hey, what are you doing, you are taking something from that woman's purse. And she turned her head and standing to her left or right, the evidence will show which, was this defendant, Mr. Fred L. Scott, the same man who had bumped into her twice earlier that morning. He had in his left hand a wallet and a check book, and his right hand was inside her purse and he was peering into the purse and Sergeant Sandberg was

on the other side of the counter and he called him. Sergeant Sandberg reached across the counter to grab him and the defendant backed away. Sergeant Sandberg came around the aisle, and at that time pulled out his badge and showed it to the defendant, and said: I am a police officer and you are under arrest.

The defendant, at that time, said: Nobody is going to hold me and Sergeant Sandberg had to grab him as he was backing toward the door and a tussle ensued, and the defendant and Sergeant Sandberg wrestled and there was tussling with each other up to and through the revolving doors of the store. During this tussel, the defendant kept reaching into his pocket on several occasions and the evidence will show that Sergeant Sandberg had to knock his hand away on each occasion when he tried to put his hand into his pocket and that finally, when they reached the outside, Sergeant Sandberg knocked his hand away again and at that time a knife flew out and flew into the air and landed in the street nearby and Sergeant Sandberg had to pull his overcoat up over his head in order to maintain the arrest. At that time, a store detective came out and the two men took the defendant back into the store.

The evidence will show therefore, ladies and gentlemen of the jury that this defendant had snatched this wallet from the pocketbook which was under the control of Mrs. Chairs at the counter and under her domain and the evidence will show he further resisted, impeded and opposed the arrest by Sergeant

Sandberg, who was acting in his official capacity as a member of the Metropolitan Police Department.

When we have shown you these facts, and you have heard the evidence, we will ask you to return a verdict of guilty, as indicted.

THE COURT: Do you wish to make an opening statement now, Mr. Pope?

MR. POPE: I wish to reserve, if Your Honor please.

THE COURT: Call your first witness.

MR. TITUS: Mrs. Kathleen J. Chaimas, please.

WHEREUPON,

KATHLEEN J. CHAIMAS

having been called as a witness by the Government and having been duly sworn, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q Would you please give us your name, please?

THE COURT: Remove your hat, Madam.

THE WITNESS: Do I have to take it off?

THE COURT: You have to take it off on the witness stand.

THE WITNESS: Do I have to take it off with this tight hair?

THE COURT: You have to take your hat off on the witness stand.

(Whereupon the witness removed her hat.)

Q Will you tell us your full name please?

A Kathleen J. Chaimas.

Q Mrs. Chaimas, what is your home address?

A 1833 Kilborn Place, Northwest.

Q That is here in the District of Columbia?

A Here in the District of Columbia.

Q Now, Mrs. Chaimas, where did you live, were you living in the District of Columbia and at this same address on February 20th of this year?

A Yes.

Q And I want to direct your attention, Mrs. Chaimas, particularly to that morning, February 20, 1961.

Did you have occasion to be downtown in Northwest Washington shopping?

A Yes.

Q And did you also have occasion on that particular morning to go to a store known as Neisner's Store? The store on the corner near Hecht's, a five and ten cent store?

A Yes.

Q Can you tell us approximately what time it was when you were in that store?

A It would be between 10:30 and 11:00 in the morning.

Q In the morning?

A In the morning.

Q Did you have at that time with you any kind of a purse?

A Yes.

Q Tell the Judge and the ladies and gentlemen of the jury what kind of a purse you were carrying and what you had in it, if you recall?

A It was a large black bag. It was really a music case and there were many things in it.

I had quite a few records, a number of check books, and my wallet and on top of those there were a lot of heavy envelopes, manila envelopes that would have been there. Another one not quite as large that I had a number of papers and records in. They were on top of these check books and the wallet that were flat in the bottom of the bag.

Q Mrs. Chaimas, do you have this bag, as you describe it a music bag, is it larger than a regular purse?

A Yes.

Q Do you have it with you?

A Yes.

Q Show it to the jury please?

(Witness did as instructed.)

Q Is that purse, the one you have before you, the same one that you were carrying on the same morning, February 20th?

A Yes, this is the same bag.

Q While you were at Weimer's Store before you left to

go elsewhere, did you have an occasion to have something unusual to happen to you in the store?

A Yes, I did.

Q Tell the Court and jury Mrs. Chaimas what that was?

A I was going down the stairway, which was a wide stairway in the rear end of the store, about the lower level where the stairs were, I was still on the staircase and when I got down just a few steps a man bumped into me.

Q Bumped into you?

A Yes.

Q How did he bump into you, Mrs. Chaimas? Will you show us what he did?

A From this side. (Indicating)

Q Your left side?

A Yes, just a little to the side and you know, a little like this, at an angle and then again on the side.

Q Bumped into you?

A Yes.

Q All right. And how many times did that happen to you while you were in Neisner's Ten Cent Store?

A Twice.

Q Was it the same man on both occasions?

A Yes, it was.

Q Do you see that same man here in the courtroom this morning Mrs. Chaimas?

A Yes, I do.

Q Would you indicate where, Mrs. Chaimas?

THE COURT: How is he dressed,Madam?

THE WITNESS: In the plaid shirt.

THE COURT: The record will show that she has designated the defendant.

BY MR. TITUS:

Q Mrs. Chaimas, did there come an occasion after these incidents happened to you in Neisner's Five and Ten Cent Store that you left that store?

A Yes, I finished my shopping there, there were just one or two things I wanted to get, some flowers and some things for the window, and from there I went over to the Hecht Company to the Camera Department.

Q Yes?

THE COURT: You say, the Camera Department?

THE WITNESS: Yes, Your Honor.

Q And when you reached the Camera Department, Mrs. Chaimas, did you have occasion to stop there for any reason?

A Yes, I did. There were a number of items in the Camera Department, photographic material that I needed.

Q And did you stop there and make a purchase?

A Yes, I bought a number of things.

Q All right. While you were there, Mrs. Chaimas, you were waited on, of course, by a clerk?

A Yes.

Q And what did you do with this bag, this music case?

A I had it on the counter like this. (Demonstrating) Shall I show you?

Q Yes, stand up and show us just how it was you had the purse?

A I was standing like this. (Demonstrating).

Q Standing like that?

A Yes.

Q And was the purse immediately in front of you?

A Yes, it was.

Q Now while the clerk was waiting on you, Mrs. Chaimas, what did you do in relation to the position you were with regard to your purse?

A After I finished making my selections of the complete transactions--after the transactions had been completed-- I didn't have any occasion to take out my wallet or anything like that because I was charging those things.

THE COURT: You may sit down, Madam.

A And I evidently had given the clerk the Charge Plate and he stepped to the phone because it was a large amount-- I mean for a First Floor purchase to make a routine check and at that moment I was concentrating on the things I was going to buy and my eyes wandered for the moment from the case.

Q Behind you?

A To an angle, at an angle. You see the angle, as a matter of fact there were displays a little further away.

Q Did you step away from the counter, Mrs. Chairnas, any distance when you turned to gaze at the display?

A I stepped back.

MR. TITUS: Your Honor, I would ask that Mrs. Chairnas, I think it is very important to the legal point involved in this case, could I ask Mrs. Chairnas to step to this table?

THE COURT: Yes.

MR. TITUS: Over on this side, Madam, so that the jury may see.

BY MR. TITUS:

Q If you will come around to this side, Mrs. Chairnas, and put your purse on the table. You do not need to speak now. Put your purse on the table as you had it at that time. Show the jury just how it was when you stepped or moved when you looked at the other display.

Don't talk, just show us.

(Witness did as directed.)

MR. TITUS: All right, thank you very much. You may return to the witness stand.

Q Mrs. Chairnas, you have shown us the distance you were in relation to your purse when you were looking at this other display, is that correct?

A Yes.

Q What was the next thing, Mrs. Chaimas, that called something to your attention?

A Very quickly I heard the voice of the clerk, a very moderate voice up until that moment, and at this moment it was a very firm challenging voice. Perhaps that might be a description. He stated, What are you doing taking things out of that ladies purse?

Q The clerk said that?

A Yes.

Q When you heard that, Mrs. Chaimas, what did you do?

A Well, I turned around immediately.

Q What did you do?

A I saw this stranger, this man, standing there and in his left hand were items from my pocketbook.

Q What items did you see that you can recall, Mrs. Chaimas?

A The first thing I saw was one of my check books and there were several check books there and I also a little later turned out to be my wallet.

Q Your wallet?

A Yes.

Q From your purse?

A Yes.

Q What else was this man doing by the way, was he to your left?

A Yes, to my left.

Q What else was he doing when you turned around and you saw him?

A This hand was still filled with items from my pocketbook, which was filled with other things, and the right hand was still in the pocketbook.

Q His right hand was still in your pocketbook?

A Yes.

Q Pocketbook?

A Yes.

Q Now you spoke, Mrs. Chaimas, of a wallet that was in his left hand?

A Yes.

Q Was there any money, Mrs. Chaimas, in that wallet if you can recall?

A About five One Dollar bills.

Q MR. TITUS: Your Honor, at this point, if the Court please I would like this wallet to be marked as Government's Exhibit 1 for identification.

THE DEPUTY CLERK: Document marked Government's Exhibit 1 for identification.

(Government's Exhibit 1 marked for identification.)

May I have Your Honor's indulgence for a moment to show it to Counsel?

BY MR. TITUS:

Q Mrs. Chaimas, I am going to show you now what has been marked Government's Exhibit 1, a black wallet, would you look at that Ma'am and tell us whether or not you can identify it?

A Yes, this is my wallet.

Q Is that your wallet?

A Yes, it is.

Q And there is, I believe, five One Dollar bills in there, is that what you recall you had in that wallet?

(The witness examined the wallet)

MR. TITUS: Your Honor, that is my error. That money had been removed and placed in an envelope.

May this envelope be marked Government's Exhibit 1A?

THE DEPUTY CLERK: Document marked Government's Exhibit 1A for identification.

(Document marked Government's Exhibit 1A for identification.)

MR. TITUS: Counsel, these are the five One Dollar bills.

BY MR. TITUS:

Q You indicated you had five One Dollar bills as you recall, is that correct?

A Yes.

Q Now, this man, whom you say was standing with the wallet in his left hand and the other articles, and his right hand was in your purse, was he the same man when you had seen

previously in the other store?

A Yes.

Q That, therefore, was this defendant, Mr. Fred L. Scott?

A Yes.

Q Now, what do you recall happened after you turned around and saw this defendant standing behind you in this place?

A I recovered my voice and I said, this is my check book you have there. I instinctively reached out to get it and I had to step around and I reached out to get the check book and he swung like this and so then I stepped around a bit, still reaching out for the check book.

Q Go ahead, Mrs. Chaimas, what happened then?

A Then he hit me and pushed me.

THE COURT: What?

THE WITNESS: He hit me.

Q The defendant?

A Yes.

Q Pushed you?

A Yes.

Q And then what happened?

A Well it seemed on reflection, even at a moment's speed of action, the man who was behind the counter was on this side and the clerk was between me and the defendant.

Q Is that the same clerk who had waited on you?

A That was the same clerk who waited on me.

Q Did you hear that same clerk say anything at that point?

A I heard him tell the defendant he was under arrest.

Q He was under arrest?

A Yes, he was under arrest.

Q What happened right after that, Mrs. Chaimas?

A The clerk also had there and was showing him something in his hand.

Q In his hand?

A Yes, sir.

Q Now do you remember anything happening right after that?

A The defendant -- I heard the defendant say at least twice -- I heard him say: I don't care if you are a policeman, no one is going to hold me.

Q No one is going to what?

A Going to hold me.

Q And then what happened?

A And he was very violent in his reaction to get away, in his attempt to resist being arrested.

Q Did you see the officer at that time and did you know he was a police officer? Did you see this clerk do anything then with the defendant?

A No, except he was trying to hold the man. The man was very violent in his resistance and this man had come around w[illegible]

thought was a clerk and attempted to hold him, but the defendant fought him and they fought through the Department, all the way through the revolving doors-- these are wide doors-- out onto the sidewalk at E Street, at the E Street entrance and across the sidewalk into the street and the traffic was very heavy and it was at that time that they were both on the ground for a moment.

Q Did you go outside through those doors?

A Yes, I did. When I saw something shining the man had in his hand I was very frightened. He was a man who was--

THE COURT: You have answered the question, Madam.

Q Yes, just answer the question. Mrs. Chaimas, this shining object you saw in the man's hand, was it in the defendant's hand?

A Yes, it was.

Q Where did you first see that, just confine your answer to that,where was it when you first saw it, if you recall?

A When I first saw it and the light flashed across it near the door.

Q Near the door.

A Yes sir, possibly at the door. Everything happened so quickly.

THE COURT: Now it is about lunch time. We will take our luncheon recess. Do not discuss this case with anyone during the luncheon recess, Madam or with anyone and I will admonish the jury not to discuss the case with anyone or allow anyone

to discuss the case with them. Do not discuss the case among yourselves until the case is finally submitted to you. Keep an open mind until all the evidence is in and you have heard the arguments of Counsel and the charge of the Court.

The Court will recess now until 1:45.

(Court recessed at 12:30 until 1:45, whereupon the following occurred in open court:)

AFTER LUNCHEON RECESS:

THE COURT: Madam, you will now resume the stand.

Whereupon

KATHLEEN J. CHAIMAS

having been previously called as a witness by the Government and having been reminded that she was still under oath, resumed the stand, was examined, and testified further as follows:

DIRECT EXAMINATION:

BY MR. TITUS:

Q Mrs. Chaimas, I want you for a moment to go back to one thing that I asked you before and I want to ask you a question relating to that, to this purse that you have described as being on the counter at the time that you had the transaction with the clerk here.

Was that purse within your control and within your reach at all times while you were standing there?

A Yes.

Q Mrs. Chaimas, you testified that you saw a silver flash or object of some type and you placed it [illegible]

the door at one point.

Did you see the same silver flashing object outside on the street after they had gone through the revolving doors?

A Yes.

Q Where was it that you saw it out there?

A I saw this flash several times but near the end after--when he was almost subdued.

THE COURT: I can't hear you, almost what?

A Near the end, just toward the end before he was subdued.

Q Where did you see it at that point?

A I saw it momentarily and suddenly it flashed through the air, it went gliding through the air.

Q Did it hit the street?

A Yes, it did. It landed against the building where the sidewalk and building met and there was a pedestrian--two men walking along and he hurried forward and put his foot on it when it landed and stood with his foot on the blade until afterwards.

Q Then you saw it at that time?

A I saw it at that time when it was recovered by the police officer.

MR. TITUS: May this be marked as Government's Exhibit 2 for identification? The other Exhibits are Government's 1 and 1A.

MR. [illegible]: Government's Exhibit 2 for identi-

fication.

(Document marked Government's Exhibit 2 for identification, knife.)

MR. TITUS: Counsel, would you step here a moment please? Your Honor's indulgence, please.

THE COURT: All right.

Q Mrs. Chairas, I will show you this knife marked Government's Exhibit 2 for identification. Would you carefully look at that now and tell us if you are able to recognize that?

A It is the--

THE COURT: I can't hear you.

A I'm sorry, sir. It is the same as the knife that I saw.

Q It is the same knife that you saw?

A Yes.

Q In addition, ma'am, just one final question that I have, this wallet, which is the black wallet marked as Government's Exhibit 1 which you indicated had the five One Dollar bills in it at the time it was in your purse?

A Yes.

Q What is the value of this, how long have you had it, and what is the value of it?

A Oh, I would imagine about Five Dollars.

Q How long have you had it, have you had it over a year?

A Possibly a year.

Q Possibly a year?

A Right.

MR. TITUS: All right. You may examine, Counsel.

CROSS EXAMINATION

BY MR. POPE:

Q Mrs. Chairas, had you ever seen this defendant before the day of February 20th, did you know him in any way?

A I didn't know him, no I didn't. I had no reason to believe I had ever seen him before.

Q You stated that you were bumped by a man twice in Neisner's earlier in the morning.

A Yes, in the Five and Ten Cent store.

Q How crowded were the conditions at Neisner's?

A Not at all.

Q Just a few people there?

A That is true and at the time on the staircase I was the only person on the staircase except the man who bumped into me.

Q Do you recall how he was dressed that day?

A Yes, he was wearing a very dark suit, a very heavy dark blue overcoat and a textured fabric. I mean it wasn't smooth cloth like covered or anything like that.

THE COURT: I can't understand you Madam. What did you say about texture?

MR. POPE: Speak as distinctly as you can, please.

THE WITNESS: That it wasn't a suit fabric like-- sorta woolly textured fabric-- a heavy woolen overcoat.

Q Was this man wearing that when you saw him a little later?

A Yes.

Q How much later was it?

A Oh, a matter of minutes.

Q A matter of minutes when you saw him later at Hecht's?

A Yes, because I went directly to Hecht's from the five and ten.

Q I see, and when you saw the flash of that knife where did it come from?

A The defendant's hand.

Q It was in his hand? And you didn't see him go into his pocket for it?

A He kept trying to get to his pocket.

Q His pocket of the topcoat or overcoat that you described or was it a pocket of another coat underneath?

A Inside the pocket.

Q Of the overcoat?

A Yes.

Q Are you positively sure, involvi[illegible] of a man like you described, he was the [illegible] in the morning?

A I am sure it was the same man. [illegible] of was his fist, it was [illegible]

THE WITNESS: That it wasn't a suit fabric like-- sorta woolly textured fabric-- a heavy woolen overcoat.

Q Was this man wearing that when you saw him a little later?

A Yes.

Q How much later was it?

A Oh, a matter of minutes.

Q A matter of minutes when you saw him later at Hecht's?

A Yes, because I went directly to Hecht's from the five and ten.

Q I see, and when you saw the flash of that knife where did it come from?

A The defendant's hand.

Q It was in his hand? And you didn't see him go into his pocket for it?

A He kept trying to get to his pocket.

Q His pocket of the topcoat or overcoat that you described or was it a pocket of another coat underneath?

A Inside the pocket.

Q Of the overcoat?

A Yes.

Q Are you positively sure, involving a matter of minutes of a man like you described, he was the same man you saw earlier in the morning?

A I am sure it was the same man. One thing I am sure of was his [illegible]

I am sure it was the same man. One thing I am sure of was his face, it was rounded, and the eyebrows, and the mustache and the scar on his nose.

Q Did there come a time when you testified at the preliminary hearing concerning this man?

A Yes.

Q At that time did you testify that you had seen this man earlier?

A Yes.

Q You testified--

A Oh, I am sorry. At the preliminary hearing? I am not sure whether the question came up at that time. I am quite sure it didn't.

Q Why didn't you bring it up then?

MR. TITUS: Objection, Your Honor.

THE COURT: I sustain the objection. How would she know why the interrogator, his reasons for not bringing it up.

THE WITNESS: If I may, Your Honor-- I want to clear a question that I answered because I may not have understood it-- if it had to do with the man-- I am not sure if he asked what that man was wearing at the time inside Hecht's or if that was what he was asking me at the time or if he was asking me what the man was wearing inside Meisner's. That is the point I am not clear about.

THE COURT: Well, suppose you ask her.

Q I will ask you this question: Was the man you thought you saw earlier dressed the same way as the man you identified as the defendant in Hecht's?

A In Hecht's? But the time, the actual thing happened so quickly, it seems to me-- everything happened so quickly and I was more conscious of his face because I know clothes can change but at that time of the apprehension of the defendant by the officer it seems to me it was a jacket he was wearing at that time.

Q Then you are not sure that it was thesame costume, although it was a very few minutes later.

A The same dark trousers and shirt, but I am not sure about the coat because the officer in trying to subdue him without injuring anyone, he was trying to hold the coat to keep his arms, to try to restrain him so I am not sure about the coat at that particular time.

Q You are not sure about the coat at the later time?

A Yes, that is what I wanted to make clear but I am sure about the person.

Q Did you see the shirt under the coat at Meisner's?

A Yes, it was the same shirt.

Q How much of the shirt did you see?

A Not very much because I didn't pay a great deal of attention. My eyes normally register at the face because I paint portraits and I am more interested in the face. I just

naturally concentrate on the face.

Q Then you really can't be sure that it was the same shirt, can you?

A I am sure it was the same person and sure it was the same shirt.

Q But you can't be sure it was the same costume?

A Well, we were only talking about the coat if I understood it correctly sir.

Q Had you had an occasion to know that the clerk with whom you were dealing and identified later as a Metropolitan policeman on February 20th?

A Oh no sir.

Q Now you testified on direct examination that when you had turned around and returned to the counter you saw in his left hand a number of items?

A Yes sir.

Q How many items were in his hand?

A There was about five check books as it turned out in my wallet.

Q Do you usually carry five check books around?

A No sir but I had a business appointment that morning. This was income tax time and that is why it would have been such a disaster if the police action hadn't recovered that.

Q Now you also testified his left hand then was away from your carrying bag, is that correct?

A Whose left hand?

Q The person who had the five articles, check books from your wallet and your wallet?

A Yes.

Q Was there anything else in his hand?

A I could see the several check books and the wallet.

Q In his left hand?

A Yes.

Q And you testified his right hand was inside the bag?

A Yes sir.

Q Now when you had returned to the counter, you testified that you wrestled and that he struck you, is that correct?

A No sir.

MR. TITUS: Your Honor, I am going to have to object to the characterization of return to the counter. I think she has physically described, has orally described to the jury, she was not away from the counter.

THE COURT: I will sustain the objection. And Counsel will be allowed to rephrase the question.

Q When you had turned back to the counter, you testified then you wrestled with this man who had the articles in his hand?

A No sir, I didn't.

MR. TITUS: I object, Your Honor.

THE COURT: I do not recall any testimony that she wrestled. But you can ask her whether she did wrestle.

Q Did you wrestle with him?

A Oh, no sir.

Q Did he strike you?

A I reached out for the check book, to see what was in his hand that I might recognize as belonging to me and as I reached for it and you know--

THE COURT: We don't know Madam. You state what he did.

THE WITNESS: Oh, I am sorry. I thought I was repeating again.

THE COURT: We do not know. When you reached up for the check book, what did he do?

THE WITNESS: When I reached out for my check book he snatched his hand back further and I still reached except closer to take the things from him and that is when he hit me and pushed me.

Q Which hand did he hit you and push you with?

A The hand that had been in the pocketbook.

Q Then what happened after that?

A Well, right at that moment, this man who had been acting as a clerk was between me-- was coming between me and the defendant and at that point on, it was a matter of the clerk making the arrest.

Q What happened to the large number of things that he had in his left hand, how you observe it to?

A No. In the struggle, they [illegible]

scattered in the struggle.

Q Where were they scattered?

A What do you mean?

Q Were they scattered on the floor?

A Yes, on the floor.

Q Or on the table?

A On the floor.

MR. POPE: Your Honor, may I ask the witness to return to the position where you made the demonstration?

THE WITNESS: Do you want the bag?

MR. POPE: Yes, please.

(The witness went to the table.)

Q In order that we may have some physical bearing here, where - were there two counters or just one?

A One long counter.

Q One long counter?

A Yes..

Q And the clerk then, would have been over here, is that correct?

A Yes, that is where he was.

Q Now were you standing at this one long counter?

A Where I am standing now.

Q And where was the defendant standing in relationship to you?

A Here to my left. Of course, it is the reverse to be

fully accurate. The floor plan is a little different there. Because the way I am standing now, this would be toward my left, would be the entrance through which I came into the Hecht's Department Store. He was standing here to my left.

Q To your left?

A Yes, to my left.

Q And when you turned away, which way had you turned away?

A This way. (Demonstrating.)

Q You turned away that way?

A Yes.

Q Now where was the end of the counter in relationship to the clerk?

A Which end?

Q Presumably this is one end of the counter, is that correct?

A The counter continues on down quite far.

Q If you will move down here, we will have a better idea of how it works.

Is this a more correct relationship to the counter?

A Yes, a somewhat longer counter.

Q And the defendant was on your left?

A Yes.

Q Did you observe the defendant when he came into the store, did you observe him standing there?

A I didn't pay any attention. As a matter of fact, I was aware of him, but I wasn't paying any real attention to him.

Q If I may, the clerk was still over here?

A Yes.

Q Where was the end of the counter in relationship to the clerk at this end?

A It would be quite a little space down. I don't know the exact portion. It might be-- it was this kind of thing that happened so quickly that I didn't stop to measure the furniture.

Q Now you were attracted to turn back by a loud voice of the clerk, is that correct?

A Yes.

Q And then you reached for the left hand, is that right?

A Yes.

Q And in the meantime, the clerk came around the counter and was grabbing him, is that correct? As I understand your testimony?

A After he hit me and pushed me, then the clerk came around.

Q Which direction did the clerk come around from?

A I didn't even see that. He moved with such speed, it was a minimum of speed and thought on his part and I knew he was there, suddenly he was there.

Q But there was quite a distance though, before he came around from this end and apprehended the man, is that correct?

A There was some distance, but he made it very quickly.

MR. TITUS: Excuse me Your Honor, but my objection goes to the testimony of the witness that she did not see him go around the end of the table. She said the next thing she knew he was there between them.

THE COURT: Overruled.

MR. POPE: Beg your pardon?

THE COURT: The objection is overruled. The jury has heard the testimony and I overrule the objection. Now proceed and let us get on with the case.

BY MR. POPE:

Q Can you give us an approximate length between this end of the counter and this end of the counter? What I am getting at is, how far the clerk would have to travel?

A It could be he came over the counter. I don't know how he traveled, but he came very quickly.

Q When he came between you and the man, where were you standing at that time? Where did you come in relation to the incident?

A I am trying to reach for the things that he had in his hand, the defendant had in his hand. I had to back my hand to this side. He was really between him and the exit.

Q You were really between him and the exit?

A Yes, when he hit me and pushed me.

Q Then you testified that the man then struggled, is that correct?

A Yes.

Q And in which direction did they struggle?

A Toward the E Street entrance. The defendant was making every effort to go in the direction of the exit which, of course, was E Street.

Q Where were you at the time, as they struggled toward this exit?

A I was sort of along there. I was sort of proceeding there-- as you know by the--

THE COURT: Won't you try to raise your voice, Madam? We are all having trouble hearing you.

MR. TITUS: Might I respectfully suggest Your Honor the witness is apparently being asked questions that have no relation to where she was.

THE COURT: Do you wish her to demonstrate anything else, Mr. Pope?

MR. POPE: Well---

THE COURT: Then let her remain and you continue your questioning but keep your voice up Madam so we all can hear you.

MR. POPE: I will make it just as short as I can.

THE COURT: All right.

Q As it actually happened, as I get the picture here in Court, you turned back from me and went-- you were reaching for the wallet and here between you and the defendant, the clerk was and he had him, was that right?

A Of course I wasn't -- I wasn't still reaching for him after I was hit and he pushed me. I was reaching for him.

at the time he hit me and pushed me. I didn't continue reaching for it at that time.

Q In which direction did you go after you were pushed?

A I went back this way and there was another showcase-- you know-- a display case behind this display case, behind me and I fell into that.

Q Now when you turned half-way, was the exit you were turning toward and looking at-- ?

A It was about the same.

THE COURT: I cannot hear you Madam, won't you please keep your voice up.

THE WITNESS: I am sorry sir, but I am really doing the best that I can.

THE COURT: I know that the jury isn't hearing you either. We must all hear the answer to that question. Do you mean the same what?

THE WITNESS: About the same distance as where this is standing.

THE COURT: Do you mean the lectern here?

THE WITNESS: Yes, sir.

THE COURT: Can you stipulate how far that is, gentlemen?

MR. TITUS: I will be happy to if Counsel will so state what his view is.

THE COURT: For the record.

MR. POPE: It looks to meabout seven or eight feet. I will estimate that.

MR. TITUS: I will stipulate to that.

THE COURT: What is it that is that far from you, your purse?

THE WITNESS: Oh, no, sir. I wasn't even as far as I am now. The question came as I heard it and was answering it was that it concerned a display that I had my eyes on while the sale was checked.

THE COURT: The display was that far from you?

THE WITNESS: Yes, sir.

THE COURT: How far was your pocketbook, your music box or whatever you called it, how far was that from you?

THE WITNESS: That was never at anytime any farther away than this. (Demonstrating.)

THE COURT: That is within the length of your hand or your arm?

THE WITNESS: Absolutely. Yes, very well within that.

BY MR. POPE:

Q When you turned around what kind of step did you take that you took away from him toward the display stand?

Were you ever at any time any farther than from this person?

A I wasn't even that far. I was only the distance from that person from my purse.

MR. POPE: You may return to the stand.

(Whereupon the witness returned to the stand.)

BY MR. POPE:

Q Now Mrs. Chaimes when you heard the clerk say something to the defendant, what did he say?

A I heard him-- I heard the clerk say-- tell the defendant he was under arrest.

Q At the counter did he say that?

A Yes, that is the first thing I heard him say.

Q And when you turned, what did you say to the clerk?

A From that point on I didn't say anything. There was no time or opportunity to say anything.

Q Now,to move on a little, Madam, you stated that they were wrestling toward the door, what happened then as they were wrestling toward the door?

A Wrestling wasn't my word. I did say and, I repeat, that when the clerk told the defendant that he was under arrest the clerk made--- I mean, the defendant made every effort to get away and the clerk made every effort to restrain him.

Q And did they go through the door, the two of them together, is that correct or had somebody else joined in?

A The two of them together. It was a revolving door and they went out through that revolving door somehow. The clerk apparently knew how it operated and was able to--whatever happens to a revolving door, to open and they went through the revolving door.

Q No one else joined in the struggle in the store?

A I am quite certain of that. I certainly didn't see anybody else join in the struggle at all.

Q I question you about this gliding that you saw. When did you first see the gliding?

A I know I saw it around the doorway.

Q On the inside of the store?

A I saw it just about right at--

Q Before they came through the door?

A Before they were completely through the door. I saw this flash. I didn't realize what it was and I saw it several times afterwards.

Q After they went through the door, did you see anybody else join them?

A No. I didn't.

Q Did you see a knife at the time of the struggle at all?

A Yes, I saw it in the street after they had already passed-- you know-- the sidewalk area, out into the street I saw it there.

Q Did you see it on the inside ofthe store?

A No, I had come out. I thought I would get help, as a matter of fact, I stopped two taxis because I thought if they had two-way radios they could bring help.

Q Mrs. Chairman--

MR. POPE: May I consult for one moment, Your Honor,

pleease?

(Counsel consulted with the defendant.)

Q Mrs. Chaimas, at the prelininary hearing on February 20th, did you testify, how did you testify as to where you were standing at the counter?

MR. TITUS: I object, Your Honor.

THE COURT: Sustained.

MR. POPE: I believe that is all I have, Your Honor.

MR. TITUS: That is all I have of this witness, Your Honor.

THE COURT: All right Madam, you may stand down. Take a seat in the court room.

THE WITNESS: I am sorry Your Honor, that I wasn't able to speak louder.

THE COURT: That is all right, but we do have to hear everything.

THE WITNESS: I know.

(Whereupon the witness withdrew from the witness stand.)

MR. TITUS: Officer Sandberg, please.

Whereupon

ROBERT SANDBERG

having been called as a witness by the Government, and having been duly sworn, took the stand, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q Will you please state your name and assignment?

A Robert Sandberg. I am attached to the Identification Bureau of the Metropolitan Police Department.

Q How long have you been a police officer, Sergeant?

A Since 1935.

Q Sergeant Sandberg, on the date of February 20, 1961 did you have a part-time job?

A Yes, sir.

Q What was your job and where did you work?

A At the Hecht Company in the Camera Department.

Q And had you had that job for any period of time, for how long?

A Since the first of December of last year or the year previous.

Q On this date, February 20, 1961, were you on duty that day?

A At the Hecht Company?

Q Yes.

A Yes.

Q And at the Hecht Company what were your hours of work? There at the Hecht Company, on that date?

A From 9:00 until 2:30.

Q Did you on that same date or during that same period

of time in February also perform your official duties on the police force?

A I did.

Q When did you report for work in the Police Department on that date?

A At 3:30.

Q 3:30 in the afternoon?

A Yes.

Q While you were at the Hecht Company, you were working in plain clothes and not in uniform?

A In plain clothes.

Q Did you carry with you at all times your police identification badge?

A Yes, I did.

Q Do you have it with you now?

A Yes, I have. I had it on me.

Q At the time you are in civilian clothes, how do you carry that badge?

A I kept it in a leather folder in my pocket.

Q Did you have it so on that morning of February 20, 1961?

A I did.

Q Sergeant, you're on duty at all hours, 24 hours a day, as a policeman in performance of your official duties?

A That is correct.

Q You never desert your duties even though you had this

temporary job?

A That is true.

Q Now, Sergeant, on the morning of February 20, 1961, did you have occasion to have any dealings with Mrs. Kathleen Chalmas?

A I did.

Q Would you describe to the Court and jury what they were?

A She came to the counter and expressed her interest in a roller-printer that we had for sale. I demonstrated it and she purchased the roller-printer.

Q About what time would you estimate that was?

A Around eleven o'clock.

Q A.M.?

A A.M.

Q After she made the purchase of this particular item, did you clear or what did you do?

A She charged the bill and I called the Credit Office to see if her credit was O.K. I called them by phone.

Q Did you find that it was?

A It was.

Q And, Sergeant, about the time you were calling for this credit check, where was Mrs. Chalmas standing?

A Across the counter from me.

Q How wide a counter is that, do you know, how wide the

counter is in feet?

A It is about 2½ feet wide.

Q 2½ feet wide?

A A normal sized counter.

Q Counter?

A Yes, counter.

Q Mrs. Chairas was on one side of the counter and you were on the other, is that correct?

A Yes.

Q Do you recall Sergeant, where she had placed her pocketbook when she was talking and dealing with you at that counter?

A Sitting right on the counter in front of me.

Q Was that also in front of her?

A Yes.

A Yes.

Q Did there come an occasion, Sergeant, when you finished making the credit check and turned your attention back to the counter?

A I hadn't finished.

Q You had not finished?

A No, I had not finished.

Q What caught your eye?

A This defendant here.

Q What was he doing?

A He had his left hand down inside her pocket book

and he had in his right hand two black objects which I later identified as a pocketbook and a check book, a billfold there.

Q And a check book?

A And a check book.

Q Do you recall at the point when your attention was diverted to the defendant, where he was standing in relation to Mrs. Chalmas?

A Next to her.

Q What side, do you remember, Sergeant?

A To her left.

Q To her left?

A To her left.

Q What hand, if you recall, was in her pocket book?

A His left hand.

Q His left hand?

A Yes, he had one hand in there and the other hand had two objects.

Q Sergeant, if he was to her left then that meant he was to her left or right?

A No, he was right up against the counter.

Q Would you leave the stand Sergeant and come down to the table?

(The witness did as instructed.)

Q Now for the moment Sergeant, imagine you are Mrs. Chalmas. I am the defendant. In front of you is this purse.

Was it the defendant's right hand in the purse and the left hand holding the billfold and the check book or was it the left hand in the purse and the right hand holding the book?

A It wasn't that far apart.

Q Which hand of the defendant was in the purse?

A The left hand.

Q Now, you look at this. Would this be my left hand over here?

A That would be correct.

Q This hand held----?

A The pocketbook and the billfold and the check book.

Q The billfold and the check book?

A Yes sir.

Q MR. TITUS: Will you please return to the witness stand?

(The witness returned to the witness stand.)

Q Now the items that were in his right hand that you have described as a check book and a billfold, were they outside the purse proper?

In other words, where were they when you saw them?

A They were in his hand outside the pocketbook.

Q Outside the pocketbook?

A Yes.

Q How far Sergeant, was the pocketbook at that point from where Mrs. Chalk was standing?

A About 1½ feet,I would say.

Q All right. Was it in your view and in your opinion, was it, the pocketbook, still under her power to reach it without moving?

A Yes. That is without taking a step. She might have to turn around a little bit.

Q She might have to turn around to the pocketbook but could reach her arm out from that position and touch the purse?

A That is right.

Q Outside of the position of the arm which you have described, what was the defendant, Sergeant, what was the defendant doing physically at that point?

A Looking inside her pocketbook, her big pocketbook.

Q Her big pocketbook?

A Yes.

Q What did you do then, what next happened after that?

A I said what are you doing, and I immediately followed that with the statement, you took her money out of her pocketbook and I put the phone down and grabbed him across the counter.

Q Were you able to reach him across the counter.

A Oh, yes.

Q What happened after that?

A He immediately said, No, I found it on the counter and he pulled away from me.

Q Pulled away from you?

A Yes.

Q What happened then?

A I ran around the counter and as I came around the counter and started after him, I immediately pulled my badge out of my pocket and showed it to him and said, I am a police officer and you are under arrest.

Q What did he do then?

A He started backing up and said that he was not going to be taken and nobody was going to hold him.

Q What happened then?

A We were struggling a little bit and all the time we were struggling we went toward the revolving door and we got inside that and I put my foot at the corner trying to hold it and I reiterated, You understand I am a police officer and you are under arrest and he said, I know but I am not going to let anybody hold me, and with that we went out of the swinging doors and struggled up the street.

Q By street, what street was it?

A On E Street, on the sidewalk.

Q When you got to the sidewalk on E Street, Sergeant, what happened then?

A Well, he pulled away a couple times and I grabbed him a couple times. He was putting his hand into his pocket and I warned him to keep his hand away from his pocket.

Q What pocket was he putting his hand into?

A Inside his coat pocket.

Q All right. Did you see anything in that hand at that time?

A No, I didn't. I knocked his hand down at least two times because he kept sticking it in there and I warned him at least two times to keep his hands out of his pockets and all that was going on in the struggle.

Q In the struggle?

A Yes.

Q When you got out on E Street, what finally happened out there?

A By this time, we had struggled up the street a little bit and we got up into the curb, down into the street and he stuck his hand in and that time I felt I had to do something because I didn't know what he was going to pull out. So I grabbed his coat and threw it over his head and as I did that he went over and I saw a knife bouncing on the sidewalk outside. I didn't know where it came from. I had never seen anything until the bouncing on the sidewalk.

Q How far did it bounce away from you? In other words, how far away from you?

A Ten feet.

Q All right. Now, were you able to subdue the defendant by pulling his coat over his head?

A I threw him to the ground and at that time I put my

knee in his back and at that time a Special Officer came up.

Q From the store?

A Yes.

Q To save time, to save some time and future questions, how long is that counter that was in front of you that you say you came around?

A Oh, ten feet.

Q And you came around it and you were in the middle there at that time?

A In the middle, yes sir.

Q So you were five feet?

A Fivefeet up and around in back.

Q I want to show you, Sergeant, what has been marked as Government's Exhibit 2 for identification, this knife. Do you recognize that as the knife you saw bouncing around about ten feet from the defendant on the ground.

A Yes, that is the knife.

Q While you were still in the store did you have occasion there after you had placed the defendant physically under arrest, to ask him about that knife?

A No, I did not ask him.

Q Were you present when he was asked about it?

A I don't think so.

Q All right. I want to show you this wallet marked as Government's Exhibit 1 for identification. Do you recognize

that?

A I do.

Q And what is that? How do you recognize it?

A This is the billfold that Mrs. Chairas had.

Q You speak of a billfold, of a billfold being in the right hand of the defendant when you first saw him. Is that the same billfold that was in his right hand?

A Well, it was the one pointed out to me as being in his right hand.

Q You did see one in his right hand?

A I saw a black billfold.

Q A billfold?

A Yes.

Q You don't specifically know whether this is the same one?

A That is the one that was pointed out to me.

Q Where did you take the defendant after you had subdued him on the sidewalk outside?

A I took him up to the second floor on the F Street side in the Special Officer's room of the Hecht Company, yes.

Q That is inside the Hecht Company store?

A Yes.

Q Did Private Spencer of Number One Precinct respond to the scene after you were there?

A Yes.

Q Sergeant, how long a period of time would you estimate as between the time you first saw the defendant with his hand in the pocketbook and the time you finally subdued him outside on the sidewalk? Do you understand my question?

A Yes, I would say three minutes at the most.

Q Do you recall, Sergeant, in your recollection, do you recall how the defendant was dressed when you saw him?

A Yes, he had a sweater on and he had a blue overcoat on, I think it was blue, real dark.

Q Was that overcoat the one you spoke of that you pulled over his head?

A Yes.

Q Incidentally, and I don't think I have asked you this specific question. Do you see that man here in the court room today, Sergeant?

A I do.

Q Would you indicate how he is dressed now?

A He has a checked shirt on.

Q A checked shirt?

A A checked shirt or jacket, whichever it might be.

Q Is that man sitting here next to the lawyer?

A That is right.

MR. TITUS: I think he has by description of the shirt indicated the defendant, Your Honor, and may the record so show.

THE COURT: The record will so show.

MR. TITUS: Your witness, Counsel.

CROSS EXAMINATION

BY MR. POPE:

Q Sergeant Sandberg--

MR. POPE: May it please the Court, I think it would be helpful to the defense and to the Court and jury to have this officer draw a very brief diagram of the First Floor of the Hecht Company on E Street showing where the counters are.

A This would be outside the store. This is the curb and the street. This is the revolving door and there is the counter. The telephone is situated about the middle. I was behind here and Mrs. Chaimas was right here and the defendant was right here at the time I saw him with his hand in the pocketbook.

I reached across here and grabbed him and he pulled back and when he did I ran around the counter and came down here. At the time I met up with him, it was about this distance and we struggled down here. This was where we stopped momentarily. We came up and went up quite a ways and there is a lamp post right here, and this is the street. And at the time he went down into the gutter, I saw the knife thrown over into this area some place.

Q While you were there, Officer, as I understand it you went around the counter this way, did you maintain your hold on

on him the whole time?

A No, I didn't. I might have-- This is close up here. This is the counter there.

Q Are there any other counters here?

A Yes, but they are not counters but display areas.

Q Approximately, what was the distance in here?

A About five feet.

Q Are there any counters up here?

A No. There was a counter that goes about as far as here and goes up just one more counter about the same size here.

Q And none over here?

A They are display areas over here.

Q Now did you maintain your hold on him when you went around here?

A No, he pulled away from me.

Q But you were able to get there and get him in time and still apprehend him here?

A That is right.

I reached across and grabbed him and when I did, he pulled and I couldn't hold him.

Q When you came around here where was Mrs. Chalmas?

A I couldn't say. I don't remember. I wasn't watching her. When I grabbed him and he pulled away, I immediately realized he was getting away and I immediately went around after him. I didn't pay any attention to where she was or where

anybody was.

Q At the time that you saw him with the articles in his right hand and his left hand in the purse, and you grabbed him, do I understand you correctly?

A I just reached out and grabbed him someplace.

Q And what were the articles in his right hand?

A It was these two dark articles. I learned later to be a pocketbook and a check book.

Q That check book?

A That check book. I believe that is all. There was one check book.

Q What happened to these articles that were in his right hand eventually? Where did they go?

A Only from what I heard.

THE COURT: Now, let us not get into hearsay. If you do not know, say so.

THE WITNESS: That is right.

Q You did not see the articles disappear then?

A No, when he still had them in his hand he had them and he said, No, I picked them up from the counter, and that was the last time I saw them.

Q Then you went around here?

A That is right.

Q Now when you turned around while you were making the phone call, did you observe the actions of Mrs. Gaither?

A I wasn't looking directly at her, no.

She was right in front of me. I was aware of her being there the whole time.

Q What did she do? Did you see her leave the counter?

A She didn't leave the counter. She may have been about one foot away.

Q Did you see her take any steps?

A Yes, she might have taken a step like this.

Q Did you see her take one or two steps?

A I think she took only one step.

Q Did she move both feet?

A She could have.

Q Would it have been one step or two steps.

A Well, it could be two of her steps. In other words, I'm not trying to confuse you. Sometimes when we measure distance by steps, my steps would be bigger than hers.

Q Will you demonstrate the actions you saw her take?

A If the counter was here, she made a step like this.

Q Where would her purse have been then?

A Right there.

THE COURT: What does your record show the answer to that is, Madam Reporter?

(The Reporter read the answer.)

Q Did you see Mrs. Charles move while you were going around the counter?

A No, sir.

Q There was room for her to get between-- for you to get between her to him without your striking her in any way?

A Well, she wasn't in my way. She was standing where she was there. If she had remained there I could have gone by her.

A I went this way. I don't know just where she was at that moment. I don't know whether she moved away from the counter or what she had done.

Q You don't recall then?

A I remember seeing her after that. That was the first time that I recall and she was out on the street, on E Street.

Q Do you recall whether you went in a straight line, right directly around the counter or whether you went over it this way because he was over this way?

A I was more over this way because he was over this way, he had moved away and was over on this side someplace and I came around the counter directly to him.

Q Can you demonstrate how far she was from her purse when you came around the counter.

MR. TITUS: Your Honor, I object and I submit this is repetition. This is the third time.

THE COURT: Ask him how many feet or inches and then we are finished with that.

THE WITNESS: I would say her body was within that distance of the pocketbook.

THE COURT: What distance?

THE WITNESS: I would say, maybe closest to a foot and a half.

MR. POPE: You may return to the stand.

(The witness returned to the stand.)

Q Officer, what was the first thing you said when you observed the defendant with his hand in the pocketbook?

A I said, what are you doing? Those were about the first words I spoke to him.

Q What did he say to you?

A Well, I followed that up with, you took that money out of her purse. And he said, no, I didn't. He said, I found this right on the counter here.

Q When did Mrs. Chainas turn back to the counter, do you know.

A That was almost instantaneous with my remark, what are you doing in her purse?

Q What did she state to you?

A At that time?

Q Yes, sir.

A I don't remember whether or not she said anything to me.

Q Did you say anything to her?

A No, I don't think I did. I don't recall saying anything to her at that time.

Q There were no words exchanged at that time that you recall?

A Not that I can recall.

Q When you apprehended him on the other side of the counter, what did you say to him then? Do you recall saying anything?

A The first thing I said to him after, or as I was approaching him and at the time showed him my badge, I am a police officer and you are under arrest.

Q This was after you had gone around the counter?

A When I came around the counter.

Q Did you, at that time, show him your badge?

A I did.

Q How close were you to the door at that time?

A Oh, we were ten feet I would say.

Q Had you at anytime, had he at any time struck you or made--

A Do you mean up to that point?

Q Well up to that point?

A No, not up to that point.

Q Did he at any time later strike you?

A Yes, we battled back and forth a little bit.

Q Were they blows or punches?

A Well, it was an effort to get away. I don't think he was fighting; like he was boxing or anything like that but

he was swinging.

Q Now there were efforts to get away?

A Yes.

Q Did you have occasion to show him your badge when you first said he was under arrest.

A Yes, I practically shoved it into his face.

Q Did you show it to him later?

A No.

Q That was the only time?

A That was the only time.

Q Did anybody come up and join in the struggle inside the store?

A No.

Q It was only after you had gone through the revolving door that anybody joined in the struggle?

A I don't think anyone joined in the struggle until we, until I had him on the ground and quite a few people had gathered and I saw quite a few but I don't think anybody participated.

Q At any time during thestruggle was there anything other than just trying to get away?

A Well, his actions were such, including him putting his hands inside his pocket, that I was assuming he had either a knife or a gun. I knocked it away from his pocket a couple of times and I would let go of him and pull his hand away from him.

MR. [illegible]: May I have [illegible]

a minute.

Q Officer, did you observe the defendant's actions in relation to Mrs. Chairas after she turned back or turned to the counter?

A The defendant's actions?

Q Yes, sir.

A I watched him back away and then I momentarily lost sight of him as I went around the counter.

I didn't look at him because there were people in back of the counter and customers in front of the counter, but I went in the general direction where he was. He was probably out of my sight less than half a second, I guess-- I mean, a half a minute.

Q Did you observe any struggling between Mrs. Chairas and the defendant?

A No, I did not.

Q You didn't observe the defendant strike any blows toward Mrs. Chairas?

A No, I did not.

MR. POPE: That is all, Your Honor.

THE COURT: Is there anything more?

MR. TITUS: Just one question, Your Honor, please.

REDIRECT EXAMINATION

BY MR. TITUS:

Q There was a brief moment when the defendant, you said, was out of your view when you came around the counter, is that

true?

A I had to turn my back on him.

Q One further thing I want to ask you, how long was the defendant in the ditch before taken to No. 1 Precinct?

A I don't know.

Q Can you estimate the time?

A No, I can't. I had left.

MR. TITUS: That is all I have, Your Honor.

THE COURT: Officer, who was it that came and joined in the struggle when you had him on the ground?

THE WITNESS: Special Officer Epps of the Hecht Company.

THE COURT: Is he here?

THE WITNESS: No, he is not.

THE COURT: Do you plan to call him, Mr. District Attorney?

MR. TITUS: Your Honor please, may we approach the Bench?

AT THE BENCH IN A LOW MONOTONE:

MR. TITUS: I submit to the Court as far as this witness, the Epps witness is concerned, the next witness which the Government has, I do not think his testimony is essential in this case. I can't see what Mr. Epps can offer, could possibly offer.

THE COURT: Do you want the [illegible]

MR. TITUS: I do not think so.

THE COURT: He was there when he was on the ground and he might have seen where this knife came from.

MR. TITUS: We are going to have a statement.

THE COURT: If you do not tender him I am going to give the missing witness instruction. This case is going over to Monday and you will have an opportunity to get him here.

MR. POPE: Your Honor has ruled.

THE COURT: You do not have to put him on, but you have at least, you could at least have him here.

MR. TITUS: He is certainly available.

THE COURT: How can you say that?

MR. TITUS: Your Honor has ruled. I'm not going to make any further comment.

MR. POPE: Your Honor, I would like to raise a point in the proffer of testimony. There was testimony given at this preliminary hearing. I tried to get the transcript and there was no transcript. Some of that testimony doesn't jibe with the testimony that was given here.

THE COURT: Were you there?

MR. POPE: No, Your Honor.

THE COURT: Then how do you know that is does not?

MR. POPE: I have talked to the defense attorney who was appointed prior to my appointment in this case by the Court. I was trying to raise these questions in cross examination so I would not have to bring him in as a witness to direct

the credibility, but since you ruled I cannot bring in any evidence from that preliminary hearing.

THE COURT: I did not so rule. The question that you asked wasn't an impeaching question. An impeaching question is one where you ask, did you say so and so, and if the witness says yes it is a conflict in what she has testified to on the stand. Then you have a conflict, and if she says no, she did not so testify, you may bring out what was said at the preliminary hearing.

MR. POPE: May I have the witness to go back on the stand. I want to go back to that day.

THE COURT: You have gone into that repeatedly. He has demonstrated just one step.

MR. POPE: The evidence I have said she took two full steps.

THE COURT: You may bring him back and ask him that, and if he denies it, then you can bring in a witness for impeaching testimony.

MR. TITUS: He has not disagreed withthat point.

THE COURT: Well, let us see about it. Let him make his record.

END OF BENCH, OPEN COURT:

THE COURT: Will you take the stand again, officer?

MR. TITUS: I want to pursue that with this officer, Your Honor.

THE COURT: I thought you had finished and that is

when I asked the question about Mr. Epps. And then you wanted to come to the Bench. All right, you finish your redirect and there will be time for Counsel to recross.

BY MR. TITUS:

Q This Special Officer that you spoke of who is attached to the Hecht Company is a Mr. Epps?

A Yes.

Q Is he still attached to the Hecht Company?

A Yes.

Q He is still employed there?

A I don't know where he is now, but he is still employed by the store.

Q He is available, do you know the gentlemen?

A Yes, I know him.

MR. TITUS: That is all I have, Your Honor.

THE COURT: Now you had some recross, Mr. Pope?

MR. POPE: Yes, Your Honor.

RECROSS EXAMINATION

BY MR. POPE:

Q Officer, you testified at the preliminary hearing on February 28th in this case, is that correct?

A Yes. Wait a minute. I don't know the date. Let's see, what was the date?

Q The date of the event was the 20th and the preliminary hearing was held before Judge Nelson, Judge Reeves, was the

28th?

A No, that was the same date.

Q That was the same date?

A That was the same date. We went to Court that afternoon. We went to Court in Judge Reeves Court.

Q On the afternoon of the same date?

A Yes, sir, the afternoon of the same date.

Q Was there a hearing the following week which you attended?

A No, then we went to the Grand Jury. Let me see. The same day of the arrest we went before Judge Reeves, yes.

Q Before Judge Reeves did you testify that Mrs. Chalmas took two full steps when she turned away from the counter?

A I may have used that term. I don't recall that I did but two steps, I'm pretty sure I might have said that but I am not too certain about two full steps. I may have used that term, I don't know now.

MR. POPE: That is all.

REDIRECT EXAMINATION

BY MR. TITUS:

Q And you have described today, you described as being the distance as she was from this purse?

A That is correct.

Q You estimated that to be a foot or a foot and a half at the most?

A That is correct.

Q Is that what you intended to say completely during your entire testimony in this case.

A Yes, steps is a kind of broad term. There was never any question about inches or feet.

MR. TITUS: That is all I have Your Honor.

THE COURT: Stand down, Officer. Call your next witness.

(Whereupon, the witness withdrew from the witness stand.)

MR. TITUS: Call Mr. Spencer. Private Spencer, please.

Whereupon

LEON EVERETT SPENCER

having been called as a witness by the Government, and having been duly sworn, took the stand, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q State your full name Officer,please.

A Private Leo Everett Spencer.

Q Attached to what Precinct?

A Attached to Number 1 Precinct.

Q The Metropolitan Police Department?

A Yes, it is.

Q Officer Spencer, were you attached to that Precinct on February 2, 1911?

A Yes, I was.

Q Did there come a time when you had an occasion on the morning of February 20, 1961 when you went to or responded to a Hecht Department Store on a trouble call?

A Yes, sir.

Q About what time did you get there Officer?

A Approximately 11:35 A.M.

Q Did you have an occasion to see this defendant, Fred L. Scott, when you arrived?

A Yes, I did.

Q In what room of the Hecht Department Store, if you recall, was that?

A The Second Floor Detention Room on the F Street side.

Q I don't want you to say what it was at the moment, but did you have any conversation with anyone relating to the events when you talked with him?

A Yes, sir.

Q At the Detention Room?

A Yes, sir.

Q How long was it you talked to him after you arrived?

A Approximately five minutes.

Q Will you look at Government's Exhibit 2, this knife. Do you recognize it Officer?

A Yes, I do.

Q Did you have an occasion to show that knife to this defendant and did you talk to him about it at the Detention Room on that morning of February 20, 1961?

A Yes sir, I did.

Q Did you ask him whose knife it was?

A Yes, I did.

Q Did he respond to that?

A He said it is my knife.

MR. TITUS: It is my knife.

Q Incidentally, Officer, how do you identify it as the knife you showed him?

A I had my initials LES scratched on the handle of the knife.

MR. TITUS: At this time, the Government, Your Honor, will offer into evidence Government's Exhibits 1, 1A and 2.

THE COURT: They will be received. Is 1A the money?

MR. TITUS: Yes, Your Honor.

THE COURT: I will over rule my decision on that. There has not been any identification of the money.

MR. TITUS: Since there couldn't be, I had no alternative. I submit anything of value is sufficient for the count involved.

THE COURT: 1A is not in evidence, members of the jury because it had not been sufficiently identified. There has been no sufficient identification that that was the money in the purse.

(Governments Exhibits 1 and 2 admitted in evidence.)

MR. TITUS: Your witness, Counsel.

CROSS EXAMINATION

BY MR. POPE:

Q Officer, did you have any other conversation with the defendant concerning that knife?

A Yes sir.

Q What was the further conversation you had with him concerning the knife?

A I asked him where he had the knife on him in his possession.

Q Where there any other questions?

A No, he explained to me as to where the knife was.

Q Did you ask him any questions as to what he was doing with it? Or what he intended to do with it?

A No, I did not.

Q There was no further conversation you reported concerning that knife?

A No, sir. He just identified the knife to me as being his.

MR. TITUS: I didn't hear the last response, Your Honor, please.

THE COURT: Read it back, Madam Reporter.

(The Reporter read the last answer.)

MR. POPE: No further questions.

THE COURT: Stand down. Do you have something further, Mr. Titus?

MR. TITUS: Yes, Your Honor, please, pursuant to that question.

REDIRECT EXAMINATION

BY MR. TITUS:

Q What did he tell you about where he had that knife?

A He stated to me the knife was inside his coat pocket.

MR. TITUS: That is all.

THE COURT: Stand down.

(Whereupon the witness withdrew from the witness stand.)

THE COURT: I will have to adjourn this case until Monday morning, ladies and gentlemen of the jury, because I have engagements in chambers.

Members of the jury, you are excused now until Monday morning at 10:00 o'clock. You will return here and assemble in the jury room which will be pointed out to you by the marshal. You are not to come into this room until you are brought in by the marshal because I have other things to attend to before resuming this case.

You will, however, assemble here at 10:00 o'clock so as to be ready as soon as I get through these other matters which I shall start at 9:30 Monday morning.

In the meantime, as I told you before, do not discuss

this case with anyone or allow anyone to discuss it with you; do not discuss it among yourselves.

I do not think there will be any publicity about this case in the papers or over the air. But if there is, I admonish you not to read anything about it or to listen to anything about it, because this defendant is entitled to a decision at your hands, based solely and exclusively on what you hear in open Court and nothing else.

Do not come to any conclusion about this case until you hear all the evidence. The defendant has not been able as yet, to put in any testimony.

You are excused now until 10:00 o'clock Monday morning.

The Court will stand adjourned until 10:00 o'clock Monday morning.

(The Court adjourned at 3:25, April 14, 1961 until Monday morning.)

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,085

FRED L. SCOTT, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Robert J. Corber
Steptoe & Johnson
1100 Shoreham Building
Washington 5, D. C.

Attorney for Appellant
Appointed by this Court

November, 1963

TABLE OF CASES

RELEVANT STATUTES

1. D.C. Code, §22-2901:

ROBBERY: Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, §810)

2. D.C. Code, §22-2202:

PETIT LARCENY - ORDER OF RESTITUTION: Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered. (Mar. 3, 1901, 31 Stat. 1324, ch. 854, §827; June 30, 1902, 32 Stat. 535, ch. 1329; Aug. 12, 1937, 50 Stat. 628, ch. 599; June 29, 1953, 67 Stat. 99, ch. 159, §215(c))

3. D.C. Code, §22-505(a):

ASSAULT ON MEMBER OF POLICE FORCE: Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than five years or both. (R.S., D.C., §432; June 29, 1953, 67 Stat. 95, ch. 159, §205)

INDEX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18,085

Fred L. Scott, Appellant

v.

United States of America, Appellee

Appeal from Judgment of the
United States District Court for the
District of Columbia

BRIEF STATEMENT OF FACTS

The uncontroverted facts are these: on February 20, 1961, complainant, one Kathleen Chaimas, was purchasing camera equipment at the Camera Department of the Hecht Department Store in the District of Columbia (Tr. 11). The clerk waiting on her was Sergeant Robert Sandberg of the Metropolitan Police Department, who was dressed in plain-clothes, and who was working there on a part time basis (Tr. 41-42). Mrs. Chaimas had placed a pocketbook containing her wallet, checkbook and other personal belongings on the counter in front of her, and while waiting for the clerk to check

her credit she turned to look at another display, and moved away from the counter (Tr. 12, 13, 36, 57, 90). The testimony as to how far she moved is in conflict.[1/]

Appellant, one Fred L. Scott, was standing near complainant (Tr. 90). The evidence is in conflict as to whether or not appellant had bumped into complainant in Neisner's ten cent store earlier on the same day. When complainant turned and moved from the Camera Department counter, appellant put one hand (the testimony is in conflict as to which hand) into her pocketbook, with intent to stealssomething of value therein (Tr. 93, 101). Before he could make off with complainant's property, however, he was challenged by Sergeant Sandberg; (Tr. 93-94); the testimony is in conflict as to the form of this challenge and as to whether Sergeant Sandberg then identified himself as a police officer. Appellant attempted to escape, and he and the police officer-clerk struggled towards, through, and out a revolving door into E street, at which time a store detective came out. The two men took the defendant back into the store (Tr. 96-97). It is agreed that when appellant and Sergeant Sandberg reached the revolving door in the course of appellant's attempt to escape, Sergeant Sandberg displayed

---

1/ A summary of disputed evidence, together with transcript of references, will be found infra, at pages 1-3.

his badge and identified himself as a police officer, (Tr. 98).

Appellant was charged with robbery (D.C. Code, §22-2901) and resisting a police officer in the performance of his official duties (D.C. Code, §22-505). He was indicted on both counts and tried on April 14, April 17 and May 1, 1961, at which trial he was found guilty of both offenses.

SUMMARY OF ARGUMENT

Appellant appeals from a judgment of conviction in the court below on the ground that because of four erroneous instructions to the jury the jury was misled as to the law, and unfairly prejudiced against him and in favor of the prosecution.

The trial court erred, first, in instructing the jury that appellant was more likely than the prosecution witnesses to be so interested in the case as to want to pervert and distort the facts. The court below erred again in defining "immediate actual possession," a necessary element of the crime of robbery under §22-2901 of the D.C. Code, as "an area within which the complaining witness could reasonably be expected to exercise some physical control over the pocketbook."

This definition was too vague and loose to guide the jury in the circumstances of the present case; its effect was to lead the jury to believe that appellant must have taken property from complainant's "immediate actual possession" even if appellant's testimony was true. This is incorrect, for if complainant were believed to be as far from her pocketbook as appellant said she was, she was not in "immediate actual possession" of it.

The trial court's instruction as to "reasonable doubt" is assigned as error, since it failed to state that the jury must find the specific fact of "immediate actual possession" to be proved beyond a reasonable doubt, according to the rule in McKenzie v. U.S., 126 F.2d 533, 75 U.S. App. D.C. 270. Finally, the trial court erred in commenting upon the evidence relating to the charge that appellant impeded and resisted a police officer, since while summarizing evidence favorable to the prosecution, the court below failed to point out that there was evidence tending to show that the fact that Sergeant Sandberg was a police officer was never brought home to appellant.

ARGUMENT

I. The Trial Court Erred in Instructing the Jury that Appellant's Testimony should be Given less Weight than the Testimony of the Complainant and that of the Police Officer Because of Appellant's Interest in the Outcome of the Case.

The jury's decision in the court below turned largely on the issue of comparative credibility. As was noted by the trial court (Tr. 141) there was a vital conflict of testimony as to whether complainant's pocketbook was within her "immediate actual possession" as required by the robbery statute, §22-2901, District of Columbia Code. The complainant, Mrs. Chaimas, testified that while she was waiting for the clerk behind the counter to verify her charge account, her "eyes wandered" from the counter and she "stepped back" to gaze at a display some distance away (Tr. 12, 13). She also demonstrated physically how she stepped or moved when she looked at that other display, and further testified that she was never at any time any farther away from the pocketbook than the length of an arm (Tr. 36). The police officer who was also the clerk behind the counter testified that the pocketbook was "under her power to reach it without moving," provided that she turned around and reached out to touch it. This distance the officer estimated to be about "a foot and a half" (Tr. 57). On re-cross examination the officer was asked,

"Q. Before Judge Reeves did you testify that Mrs. Chaimas took two full steps when she turned away from the counter?

A. I may have used that term, I don't recall that I did, but two steps, I am pretty sure I might have said that, but I am not too certain about two steps. I may have used that term, I don't know now." (Tr. 65)

On the other hand, appellant testified that Mrs. Chaimas "stepped from the counter approximntely as far as from here to the end of the table there,[1/] and she was looking around at something else that was in the store there" when he put his hand in her pocketbook. (Tr. 90)

There were other conflicts of testimony as well: for example, the complainant testified that appellant bumped into her in Neisner's store before attempting to steal her wallet at Hecht's (Tr. 10); appellant denied this (Tr. 89). The complainant testified that she saw appellant with his right hand in her pocketbook and his left hand holding her wallet (Tr. 15), while the police officer stated that appellant's left hand was inside the pocketbook while his right hand held objects from the pocketbook (Tr. 44). Again, although Mrs. Chaimas testified that appellant hit and pushed her (Tr. 17), Sergeang Sandbert said that he did not observe any struggling between Mrs. Chaimas and appellant (Tr. 60), and appellant testified that he had no dealings whatsoever with

---

1/ Appellant here designated the counsel table (Tr. 140).

Mrs. Chaimas. (Tr. 96) The appellant further testified on cross-examination that he raised the wallet to the top of the pocketbook and immediately dropped it back when challenged by the police officer (Tr. 93), but Mrs. Chaimas stated that she saw appellant holding items from her pocketbook in the air (Tr. 14).

The question of whom the jury was to believe was a vital one, principally because the issue of whether appellant was guilty of robbery or merely of petty larceny hinged upon the conflicting testimony as to the distance between Mrs. Chaimas and her pocketbook. Moreover, as will be further discussed, infra, Point IV, the comparative credibility of the evidence as to how and when the police officer identified himself to appellant may have influenced the jury in deciding whether or not appellant was guilty of interfering with a police officer in the exercise of his official duties. Appellant respectfully contends that the trial court's general instruction on credibility, which follows, irretrievably prejudiced the jury in favor of the prosecution:

> "In determining credibility, you will take into account the manner and demeanor and conduct of the witnesses as they testified, their ability to see and hear the things about which they testified, their faculty to express to you through the medium of words what they have seen or heard, any bias or prejudice which any witness may have shown which may have distorted his testimony, any interest in the outcome of the case which may have colored the witness' testimony, because when a witness has a deep personal interest in the outcome of the case,

> which is true of the defendant, and in a lesser degree true of the police officer and the complaining witness, the temptation is sometimes strong to color and pervert and distort the facts." (Tr. 137) (Emphasis added.)

The key words in this instruction are "in a lesser degree true of the police officer and the complaining witness". The court stated, in effect, that the jury should give more credence to the testimony of the police officer and the complainant than to appellant's story, because the officer and complainant were in all likelihood less "interested" than the appellant. Appellant respectfully submits that this instruction is erroneous on its face. The idea that a police officer or a complainant is less likely than a defendant to "pervert and distort" the facts, or that either is less subject than a defendant to lapses of memory, is a novel excusion into the field of psychology which can be supported neither by precedent nor by common sense. Of course, defendants sometimes twist the truth to save themselves from criminal sanctions; but it is no less obvious that police officers sometimes twist the facts to save themselves from embarrassment, complaining witnesses sometimes twist the facts out of vengeance and both are sometimes merely mistaken. Appellant does not impute nefarious motives to any of the principals of the present case, but respectfully disagrees with the trial court's general statement as to the psychology of witnesses.

Although the court below instructed the jury that "you are the factfinders" (Tr. 137), this instruction was rendered

nugatory by this erroencus instruction as to credibility. The effect of the instruction was clearly to persuade the jury to believe the testimony of the police officer and the complainant rather than that of appellant. This appellant contends was reversible error.

II. The Trial Court Erred in Defining the "Immediate Actual Possession" Necessary to the Crime of Robbery under §§22-2901 of the District of Columbia Code.

Appellant's court appointed counsel in the court below prayed for instructions to include, inter alia, "petty larceny" (Tr. 113), on the ground that appellant did not take complainant's property from her "immediate actual possession", which he must have done to be guilty of robbery under §22-2901 of the District of Columbia Code. Although the trial court instructed on petty larceny (Tr. 116), and defined "immediate actual possession" (Tr. 144, 141), appellant contends that these instructions were erroneous and misleading in that the trial court defined "immediate actual possession" by relying wholly and unjustifiably on certain language from the decision in Spencer v. U.S., 116 F.2d 802, 73 App. D. C. 98 (1941).

Before giving its instruction the trial court gave notice that it intended to rely entirely on language of the Spencer case:

> "MR. TITUS: . . . I will not object to a definition your Honor on what constitutes control and dominion over the article.
>
> "THE COURT: I know, the Spencer case settled that."

The court then instructed the jury and commented upon the evidence as follows:

> "Now one of the points raised in this case, so far as this robbery charge is concerned,

is whether the taking, if you find there was a taking, was from the person or immediate actual possession of the complaining witness, the prosecuting witness, Mrs. Chaimas. Now, this involves a determination of where that pocketbook was. There have been various estimates of distance the pocketbook was from the complaining witness at the time of this transaction. These distances range, as I recall the testimony, from an arm's length to a foot and a half to two steps, as I recall the Government's testimony, and to a distance between the witness chair and the counsel table, according to the defendant's testimony.

There is no doubt that the complaining witness, Mrs. Chaimas, put her pocketbook on the counter and turned away from it to look at something else. Whether it was within her immediate actual possession, as the statute requires, is one of the questions raised for your decision in this case.

Now, what does immediate actual possession mean? It refers to an area within which the complaining witness could reasonably be expected to exercise some physical control over the pocketbook.1/

When I use the word 'pocketbook' I mean that large bag. And you will have to determine whether in her immediate actual possession, under this definition, this pocketbook--or I should say, you will have to determine whether this pocket-book was within her immediate actual possession under this definition that I have given you, upon a consideration of all the evidence in the case which is conflicting." (Tr. 140-141) (Emphasis added.)

The question of what constitutes "immediate actual possession" is of the greatest import in the present case, for if the taking was not from the immediate actual possession of the

---

1/ This definition is taken verbatim from the Spencer case, 116 F.2d 801 at 802.

complainant, appellant would be guilty, at most, of the crime of petty larceny (D.C. Code, §22-2202). As was said in the case of Turner v. U.S., 16 F.2d 535, 57 App. D.C. 39 (1927), §22-2901 of the District of Columbia Code "can signify nothing else than a legislative intent to denounce pocketpicking and the like, together with common law robbery, under the single general name of 'robbery' . . . the requirement of force is satisfied by an actual physical taking of the property from the person of another, even though without his knowledge and consent, and though the property be unattached to his person." (at page 536). The District of Columbia statute thus adds to common law robbery, of which an essential element is force or violence, theft by "sudden or stealthy seizure or snatching". Although at common law the ordinary pickpocket was "guilty of larceny from the person, rather than robbery, because there is no violence or intimidation in perpetrating the theft, [1/]" he may now be found guilty of the more serious offense of robbery. For this reason, it is necessary to define most carefully and narrowly in the circumstances of each case the meaning of "immediate actual possession", for, as was said in Newfield v. U.S., 118 F.2d 375, 388, 73 App. D.C. 174, cert.den. 62 S.Ct. 580, 315 U.S. 798, 86 L.Ed. 1199 (1941),

> "Larceny is an offense against possession; robbery against the person. The local robbery statute in our view uses the word 'possession' in a colloquial sense, meaning nothing more than custody or control."

1/ Perkins on Criminal Law, 1957 Ed., p. 238.

To define "immediate actual possession" so loosely as to include constructive possession would result in abolishing the distinction between robbery and petty larceny, which was surely not the interest of the framers of §22-2901.

In the present case, as has been noted, there was a conflict of testimony as to the distance between the complainant and the pocketbook which she left on the counter at Hecht's. If appellant's testimony was true, there should have been robbery conviction in this case, but at most a conviction for petty larceny, for there would have been constructive rather than "immediate actual" possession by the complainant. If the complainant had walked over to another part of the flocr of Hecht's leaving her pocketbook to be guarded by a counter clerk, it could not seriously be contended that appellant was committing an offense against the "person" of the complainant (Neufield v. U.S.) by attempting a theft from the pocketbook. Yet the instruction given by the trial court obscured this point in a most misleading manner by defining "immediate actual possession" in the language of Spencer as "an area within which the complaining witness could reasonably be expected to exercise some physical control over the pocketbook" (Tr. 141).

In Spencer the victim was induced by defendant and another to accompany the latter to a room where he had intercourse with the latter; while thus engaged, defendant took

money from his trousers, which were hanging over a bedpost. A robbery conviction was sustained, the court defining "immediate actual possession" as already noted. But the court in Spencer continued,

> "Here the taking was within a very few feet of the victim, in the same room, and where, had he known of it, he could have made effective efforts to retain his property." (at page 802).

Obviously, the "physical control" alluded to in Spencer must be read in the context of the facts of that case. In Spencer, the principals were in a single small bedroom, not on an open floor of a huge department store. In Spencer the article stolen was clearly within the reach of the defendant, and not possibly 20 feet away. Yet, in spite of these distinctions, the court below quoted the language of the Spencer case as if "an area within which the complaining witness could reasonably be expected to exercise some physical control" had clear meaning in the circumstances of the present case.

This is not so. The bare words of Spencer not only left the jury in the dark as to the meaning of "immediate actual possession" but positively misled them. Mrs. Chaimas testified that her attention was drawn back to her pocketbook by the "very firm challenging voice" of the police officer-clerk who was attempting to stop the attempted theft (Tr. 14). Clearly, if Mrs. Chaimas had been 20 or even 40 feet from the counter in the crowded department store, she would have heard the loud challenge of the police officer, seen the attempted theft, and come hurrying back to protect

her property. Does this mean that the property would have been in her "immediate actual possession?" The trial court's loose citation of the words of the Spencer case implies that as long as Mrs. Chaimas was within shouting distance of the police officer, the pocketbood was within her immediate possession.

The jury in the present case was entitled to a precise and coherent definition of "immediate actual possession." The jury was entitled to be told that the ability to exercise some physical control over the property was not enough to constitute "immediate actual possession" if complainant had to run back from another part of the department store to exercise that "physical control." Appellant contends that the jury was led to believe that even if they gave credence to his story they must nevertheless find him guilty of robbery, since Mrs. Chaimas could "exercise some physical control" over the pocketbook even if she were ten, twenty, or forty feet from her property. Appellant contends that this is not true as a matter of law, that a more intimate connection between complainant and property is intended by the words "immediate actual possession" The trial court's failure to give a more careful and relevant instruction on "immediate actual possession" was therefore reversible error.

III. The Trial Court Erred in Failing to Instruct the Jury that the "Immediate Actual Possession" of the Complaining Witness Must be Proved Beyond a Reasonable Doubt in Order for the Jury to Find Appellant Guilty.

The core of the trial court's instruction as to "reasonable doubt" is contained in the following three paragraphs:

> "This appellant enters this case clothed with the presumption of innocence. That presumption abides with him throughout the trial until it has been overcome by evidence which convinces you of guilt beyond a reasonable doubt.
>
> The burden of proof rests upon the government to establish the essential elements of the offenses charged." (Tr. 138)
>
> "Now if you find that each and all of the essential elements of the offense of robbery, as I have given them to you have been established beyond a reasonable doubt, your verdict on the first count will be guilty of robbery." (Tr. 143)

Nowhere in its instruction did the trial court draw the jury's attention to the specific proposition that if there were a reasonable doubt as to the principal question of fact, i.e., the distance between Mrs. Chaimas and her pocketbook, the jury must find appellant not guilty of robbery. When commenting upon this part of the evidence, the court said merely,

> ". . .you will have to determine whether this pocketbook was within her immediate actual possession under this definition that I have given you, upon a consideration of all the evidence in the case which is conflicting." (Tr. 141)

Appellant contends that the jury should have been clearly instructed at this point that they were not merely to balance "evidence which is conflicting" in order to determine whether there was "immediate actual possession", but that they must have an "abiding conviction" of the truth of the prosecution witnesses'

testimony as regarded the immediate possession of the complainant. To comment upon the evidence without making this clear was prejudicial to the jury.

Cases in this jurisdiction establish that where the jury's decision hinges on one or more important questions of fact, it is the duty of the trial court to instruct that the jury must find such specific facts to be proved beyond a reasonable doubt in order to find a defendant guilty. For example, in McKenzie v. U.S., 126 F.2d 533, 75 U.S. App. D.C. 270 (1942), the failure of the trial court to instruct specifically that complainant's identification of defendant must have been proved beyond a reasonable doubt was held to be reversible error, the Court saying,

> "Passing upon a similar question in McAffee v. U.S., 70 App. D.C. 142, 105 F.2d 21, we said on this subject, it should be orthodox practice somewhere in the instruction to tell the jury in precise terms that a 'not guilty' verdict is necessary in the event of failure by the government to prove each of the elements of the offense beyond a reasonable doubt." (at p. 536)

Appellant contends that it was not sufficient, within the meaning of McKenzie v. U.S. and McAffee v. U.S., for the trial court to instruct generally that "if you find that each and all of the elements of the offense of robbery as I have given them to you have been established beyond a reasonable doubt, your verdict on the first count will be guilty of robbery." (Tr. 143-144) The court below should, when commenting on the evidence, have stated clearly and unequivocally that the jury must find the highly-disputed element of "immediate actual possession" to be proved beyond a reasonable doubt. Its failure to do so was error since the jury can not be presumed to have applied the general instruction quoted above to the specific evidence commented upon.

IV. The Trial Court Erred in the Manner in Which it Commented upon the Evidence Relating to the Charge that Appellant Resisted and Opposed a Member of the Police Force Engaged in the Performance of His Official Duties.

The second count of the indictment charged that Appellant had violated §22-505 of the District of Columbia Code by "assaulting, resisting, opposing, impeding, intimidating or interfering" with a member of the District of Columbia police force while engaged in the performance of his official duties. Appellant submits that the trial court's comment upon the evidence adduced to prove this charge unfairly prejudiced the jury, in that it summed up the evidence favorable to the prosecution while omitting to summarize evidence favorable to the defense. The trial court said,

> "In this case, the police officer was in plain clothes, and if the defendant did not know that he was a police officer or did not have that fact brought home to him, he would not be guilty of assault on a police officer.
>
> The officer has testified that he showed the defendant his badge, and the defendant admits this. There is no dispute that the officer was a police officer, that the witness Sandberg was a police officer, although he was not then on official police duty. But a policeman, although not on official tour of duty, is always on duty 24 hours a day." (Tr. 145)

The above instruction reads like a proposition in logic: 'If the defendant knew the police officer was an officer, he is guilty; he did know this; therefore (the tacit conclusion) he is guilty.'

Appellant did testify, as the court below said, that Officer Sandberg identified himself as a police officer; but the circumstances of that identification give rise to inferences other than those derived by the trial court.

Appellant stated,

> "Q. Do you recall the Clerk, Mr. Sandberg, identify himself as a police officer?
>
> A. He did that, he identified himself as a police officer when he was at the revolving door.
>
> Q. You were well away from the counter then?
>
> A. We were right at the door, two or three feet from the door, sir. And he did pull his badge out and he showed it to me, but by the other fellow holding the door and he and I was wrestling so, until I guess I just was excited and didn't pay it any mind. But that was the only time that he showed it to me, but he did do it then." (Tr. 98-99)

Officer Sandberg testified:

> "As I came around the counter and started after him, I immediately pulled my badge out of my pocket and showed it to him and said, I am a police officer and you are under arrest.
>
> Q. What did he do then?
>
> A. He started backing up and said he was not going to be taken and nobody was going to hold him.
>
> Q. What happened then?
>
> A. We were struggling a little bit and all the time we were struggling we went toward the rovolving door and we got inside that and I put my foot at the corner trying to hold it and I re-iterated 'You understand I am a police officer and you are under arrest,' and he said, 'I know but am not going to let nobody hold me.' And with that he went out of the swinging doors and we struggled up the street." (Tr. 47)

Mrs. Chaimas stated on direct examination that the first thing the officer said was "What are you doing taking things out of the lady's purse?" (Tr. 14); on cross-examination she stated that the first thing she heard the officer say was to tell the appellant that he was under arrest (Tr. 37).

There was thus a serious conflict in the testimony as to the manner in which Officer Sandberg identified himself. While the officer testified that he immediately, or almost immediately, identified himself as a policeman, and displayed his badge, appellant testified that the showing of the badge and the identification took place later on, in the midst of a struggle. If appellant was telling the truth, there was probably no violation of §22-505, since when appellant was caught in the act of attempted theft by a person he reasonably believed to be a clerk, the sudden and momentary identification of that clerk in the midst of an ensuing struggle as a police officer would not necessarily have "brought home to him" the fact that he was resisting arrest by a police officer. §22-505 states that to be a violator thereof, one must resist a police officer "without justifiable and excusable cause." The court below rightly pointed out that the fact that a police officer is such must be "brought home to" the accused. But if appellant's story be believed, if he did not say "I don't care if you are a policeman, no one is going to hold me" (Mrs. Chaimas, Tr. 18), there was "justifiable cause" for such resistance.

The instruction of the court below entirely obscured the legal consequences which would flow from the jury believing appellant's story rather than that of prosecution witnesses. The trial court clearly overstepped the bounds of legitimate comments upon evidence by stressing the fact that "the officer has testified that he showed the defendant his badge, and the defendant admits this." (Tr. 145) If the court below felt it necessary to review this evidence favorable to the prosecution, it was duty-bound to add that the mere flashing of a policeman's badge may not have been sufficient identification, and that if appellant

was telling the truth the fact that the clerk was a police officer may have not registered on him. Appellant respectfully contends that the failure of the trial court to thus balance the scales constitutes reversible error.

For the foregoing reasons, appellant respectfully prays that the judgment of conviction in the District Court for the District of Columbia be reversed forthwith.

Robert J. Corber
Steptoe & Johnson
1100 Shoreham Building
Washington 5, D. C.

Attorneys for Appellant
Appointed by this Court

Dated: November , 1963

No. 18,085

United States Court of Appeals
For the District of Columbia Circuit

FRED L. SCOTT, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS, JR.,
ANTHONY A. LAPHAM,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Was it error to instruct the jury that the personal interest of a witness in the outcome of a case was a factor to be considered in determining his credibility, and that the appellant had a greater interest in the outcome of his own case than did either the police officer or the complaining witness?

2) In a prosecution for robbery, was the concept of "immediate actual possession" adequately and correctly defined as "an area within which the complaining witness could reasonably be expected to exercise some physical control over her property"? Was the jury adequately informed that the prosecution bore the burden of proving "immediate actual possession" beyond a reasonable doubt?

INDEX

TABLE OF CASES

---

* Cases chiefly relied upon are marked with asterisks.

United States Court of Appeals
For the District of Columbia Circuit

No. 18,085

FRED L. SCOTT, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

An indictment filed March 21, 1961, charged appellant with one count of robbery (D.C. Code 2901) and one count of assault on a police officer (22 D.C. Code 505(a)). A jury found appellant guilty as indicted, and by judgment and commitment filed May 19, 1961, he was sentenced to terms of imprisonment of from two (2) to six (6) years on the robbery count and twenty (20) to sixty (60) months on the assault count, the sentence on the second count to run concurrently with the sentence on the first. This appeal followed.

On February 20, 1961, Mrs. Kathleen Chaimas was shopping in the Hecht Department Store. With her she carried a large, black bag containing papers, envelopes, some checkbooks, and a wallet (Tr. 8-9). While making a purchase in the camera department she laid the bag on

the counter in front of her but took her eyes off it while her credit was being checked (Tr. 12-13). The bag was "well within the length of her hand and arm" (Tr. 36) and "within her control and reach at all times." (Tr. 20). When she heard the clerk say "What are you doing taking things out of that lady's purse?", she turned around and saw appellant with some of her checkbooks and her wallet in his left hand and his right hand still in her bag (Tr. 14-15). She recognized appellant as the man who had twice bumped into her at Neisner's Ten Cent earlier that day (Tr. 10). When Mrs. Chaimas reached out to reclaim her property, she was hit and pushed by appellant (Tr. 17, 29). The clerk intervened at this point, told appellant he was under arrest and showed him something held in his (the clerk's) hand. Appellant was heard by Mrs. Chaimas to reply "I don't care if you are a policeman, no one is going to hold me." (Tr. 18). There followed a struggle between the clerk and appellant which carried these two combatants out of the store onto the E Street sidewalk (Tr. 19, 34, 37). During this struggle Mrs. Chaimas saw a flashing object in appellant's hand which she later discovered to have been a knife (Tr. 21-24, 38).

Robert Sandberg was the clerk who waited on Mrs. Chaimas and struggled with appellant. He was also a sergeant in the Metropolitan Police Department, although he wore plain clothes on the day of the offense (Tr. 40-41).[1] Sandberg testified that he saw Mrs. Chaimas place her bag on the counter and that when his attention was first drawn to appellant the latter had his left hand in the bag and was holding a billfold and a checkbook in his right (Tr. 43-44). At that point Mrs. Chaimas was standing about a foot or a foot and a half from her bag, and in Sandberg's opinion she could have reached the bag without taking a step (Tr. 45-46, 55, 57). Sandberg came around the counter, displayed his badge and identified himself as a police officer, and told appellant he was under

---

1 Sandberg testified that he remained on 24 hours a day duty as a policeman despite temporary outside employment.

arrest (Tr. 46-47, 58). To this appellant replied that "he was not going to be taken and nobody was going to hold him." (Tr. 47). During the struggle which followed and which continued through a revolving exit door into E Street, appellant kept reaching for his pocket (Tr. 47). As appellant was finally subdued, Sandberg saw a knife bouncing on the sidewalk (Tr. 48).

Henry Lee Epps, a store detective employed at Hecht's, witnessed the struggle between appellant and Sandberg and saw the knife fall from appellant's right hand (Tr. 74).

Appellant took the stand and testified that Mrs. Chaimas had placed her black bag on the store counter and then had stepped away "approximately as far as from here to the end of the table there" (presumably indicating the distance from the witness chair to the end of one of the counsel tables) (Tr. 90). While "she was looking at some things over there," appellant reached into her bag, took a wallet in his fingers and raised it to the bag's brim (Tr. 90, 93, 108). His admitted intent was to steal (Tr. 101). When he was seen in the act of theft by Sandberg, appellant dropped the wallet back into the bag (Tr. 90, 95). He struggled with Sandberg inside the store in an attempt to get away (Tr. 96, 100). According to appellant, Sandberg did not identify himself as a police officer until the parties reached the revolving exit door (Tr. 98). But the fight continued into the street (Tr. 97, 107). Appellant admitted having carried a paring knife for protection and said he had thrown it away so it would not be found in his possession when he was arrested (Tr. 97). He denied ever having touched Mrs. Chaimas (Tr. 96).

During cross-examination appellant acknowledged twenty-one prior larceny convictions (Tr. 102-106).

The jury was instructed on the elements of the lesser offense of petit larceny as well as on the offenses charged in the indictment (Tr. 144).

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 22, District of Columbia Code, Section 505(a) provides:

> Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than five years or both.

Title 22, District of Columbia Code, Section 2202 provides:

> Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made away with or otherwise disposed of and not recovered.

Rule 30, Federal Rules of Criminal Procedure, 18 U.S.C., provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed.

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52(b), Federal Rules of Criminal Procedure, 18 U.S.C., provides:

> *Harmless Error And Plain Error*
>
> (b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

The court did not err in instructing the jury that the credibility of a witness could be affected by his interest in the outcome of the case, and that the appellant had a greater interest than either the complaining witness or the police officer. An instruction on credibility which refers to the special interest possessed by a defendant is proper as long as there is no disparagement of his testimony or intimation that he is not entitled to the presumption of innocence.

The court did not err in failing to distinguish between the offense against possession which is larceny and the offense against the person which is robbery. The jury was instructed that a taking from the person or immediate actual possession of another was a necessary element of the crime of robbery and that the prosecution bore the burden of proving this element beyond a reasonable doubt. The meaning of immediate actual possession was correctly defined as the area within which the complaining witness could reasonably be expected to exercise some physical control over his property.

The court did not unfairly comment on the evidence which supported the assault count of the indictment. Appellant's own testimonial admissions were sufficient to sustain a conviction on this count, and he therefore cannot complain that an accurate comment on those admissions unfairly weighted the charge against him.

ARGUMENT

I. The instructions to the jury were correct (see Tr. 150)

Appellant complains of four errors in the trial court's instructions to the jury. None of these alleged errors was brought to the attention of the trial court either by objection or by request for instruction (Tr. 150).

Failure to object before the jury retired to consider its verdict precludes appellant from assigning as error portions of the charge or omissions therefrom. Rule 30, Fed. R. Crim. P. *Dukes* v. *United States,* 107 U.S. App. D.C. 382, 278 F.2d 262 (1960); *Ruffin* v. *United States,* 106 U.S. App. D.C. 97, 269 F.2d 544 (1959), *cert. denied* 361 U.S. 865; *Moore* v. *United States,* 104 U.S. App. D.C. 327, 262 F.2d 216 (1958); *Pitts* v. *United States,* 99 U.S. App. D.C. 63, 237 F.2d 217 (1956); *Wyche* v. *United States,* 90 U.S. App. D.C. 67, 193 F.2d 703 (1951), *cert. denied* 342 U.S. 943; *Villaroman* v. *United States,* 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

The portions of the charge about which appellant now complains for the first time were careful and correct statements of the applicable law. The instruction allegedly omitted was in fact given in precise terms. Absolutely no basis exists, therefore, for the exercise of discretionary authority under Rule 52(b), Fed. R. Crim. P.

a. The instruction on credibility (see Tr. 137).

Appellant finds fault with the instruction which informed the jury of the matters which properly could be considered in assessing his credibility as a witness. The instruction was cast in the following terms:

> In determining credibility, you will take into account the manner and demeanor and conduct of the witnesses as they testified, their ability to see and hear the things about which they testified, their faculty to express to you through the medium of words what they have seen or heard, any bias or prejudice which any witness may have shown which may have distorted his testimony, any interest in the outcome of

> the case which may have colored the witnesses' testimony, because when a witness has a deep personal interest in the outcome of the case, which is true of the defendant, and in a lesser degree true of the police officer and the complaining witness, the temptation is sometimes strong to color and pervert and distort the facts. (Tr. 137).

The defect of this instruction is said to lie in its reference to appellant as the witness with the greatest interest in the outcome of the case.

The nature and extent of his interest in the outcome of the case may vitally affect the weight which the jury gives to the testimony of a particular witness. And the law has long recognized that a criminal defendant has an interest in the result of his trial unlike that possessed by any other witness. Since, in taking the stand, a defendant assumes all the burdens of an ordinary witness, *Raffel* v. *United States*, 271 U.S. 494 (1926); *Viereck* v. *United States*, 78 U.S. App. D.C. 279, 139 F.2d 847 (1944), it is proper to invite the jury's attention to his special interest and its possible bearing on his credibility. This of course does not mean that the testimony of a witness-defendant may be singled out and denounced as false. As the Supreme Court said in *Reagan* v. *United States*, 157 U.S. 301 (1895):

> The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. (157 U.S. at 305)
>
> * * * * * *
>
> . . . the court is not at liberty to charge the jury directly or indirectly that the defendant is to be disbelieved because he is a defendant, for that would practically take away the benefit which the law grants when it gives him the privilege of being a witness. On the other hand, the court may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of the defendant in the result of the trial is

> of a character possessed by no other witness, and is therefore a matter which may seriously affect the credibility that shall be given to his testimony. (157 U.S. at 310)

The principles announced in the *Reagan* case have frequently been approved and applied. *Stapleton* v. *United States,* 260 F.2d 415, 420 (9th Cir. 1958); *Marino* v. *United States,* 91 F.2d 691, 699 (9th Cir. 1937) and *cf. Foley* v. *United States,* 290 F.2d 562, 569 (8th Cir. 1961); *Shettel* v. *United States,* 72 App. D.C. 250, 253, 113 F.2d 34, 37 (1940). Those principles were closely adhered to by this trial judge, who at no time disparaged appellant's testimony or singled it out as false. They are dispositive of the issue raised by appellant.

b. The instructions on immediate actual possession (See Tr. 17, 29, 45-46, 55, 57, 90, 141, 142, 143, 144).

Appellant finds two flaws in the instructions on "immediate actual possession". He contends (1) that the definition given by the court was erroneous and misleading, and (2) that the court misstated the government's burden of proof. Both contentions are without merit.

(1) It was not disputed that appellant reached into the bag owned by Mrs. Chaimas and picked up her wallet with intent to steal. The testimony was in conflict, however, as to the distance which separated Mrs. Chaimas from her bag at the time the taking occurred. The government's evidence placed Mrs. Chaimas within easy reach of her bag at a distance of a foot or a foot and a half (Tr. 45-46, 55, 57). Appellant's testimony placed Mrs. Chaimas at a distance described as "approximately as far as from here to the end of the table there" (the witness chair and a counsel table being the apparent reference points) (Tr. 90). Since appellant's testimony, if believed, might have located the bag outside the immediate actual possession of Mrs. Chaimas and therefore defeated the robbery prosecution, the court instructed the jury on the lesser offense of petit larceny (Tr. 144). The jury was instructed that whether the bag was in the immediate

actual possession of Mrs. Chaimas at the time of the taking was a fact to be decided upon the conflicting testimony and under the following definition:

> Now, what does immediate actual possession mean. It refers to an area within which the complaining witness could reasonably be expected to exercise some physical control over the pocketbook (Tr. 141, repeated at Tr. 142).

This definition was framed in the exact language conceived and approved by this Court in *Spencer* v. *United States,* 73 App. D.C. 98, 99, 116 F.2d 801, 802 (1940), a case wherein it was held that money in the pocket of trousers hanging at the foot of the bed on which he was having intercourse was within the complainant's immediate actual possession.[2] And *cf. Neufield* v. *United States,* 73 App. D.C. 174, 187, 118 F.2d 375, 388 (1941); *Turner* v. *United States,* 57 App. D.C. 39, 16 F.2d 535 (1926).

(2) The record itself refutes appellant's contention that the court failed to instruct the jury that the government bore the burden of proving immediate actual possession beyond a reasonable doubt. The pertinent instructions were as follows:

> The essential elements of robbery are there: . . . Third, that he (appellant) took the property described in the indictment from the immediate actual possession of the complaining witness as I have defined the term to you. (Tr. 143).

* * * * * *

---

[2] After defining immediate actual possession, the court in the *Spencer* case went on to say:

"A stealthy seizure of his property within that area is made "robbery" by the statute. Here the taking was within a very few feet of the victim, in the same room, and where, had he known of it, he could have made effective efforts to retain his property. It was clearly stealthy. This complies fully with the terms of the statute." (73 U.S. App. D.C. at 99, 116 F.2d at 802).

In the instant case, the taking, accordingy to the government's testimony, took place within a foot or a foot and a half of Mrs. Chaimas, and she not only could have made, but did in fact make, efforts to retain her property (Tr. 17, 29).

> Now, if you find that each and all of the essential elements of the offense of robbery, as I have given them to you, have been established beyond a reasonable doubt, your verdict on the first count will be guilty of robbery. (Tr. 143-144).

c. The comment on the evidence (see Tr. 96, 98-99, 107, 145).

The second count of the indictment charged appellant with violating 22 D.C. Code 505(a) by "assaulting, resisting, opposing, impeding, intimidating or interfering" with a member of the District of Columbia police force while engaged in the performance of his official duties. Appellant's own testimony was sufficient to support his conviction on this count. He admitted struggling with Sandberg in an effort to get away, admitted that Sandberg identified himself as a police officer by presenting his badge at the revolving exit door, and admitted that he continued to fight on out into the street (Tr. 96, 98-99, 107). His stated reasons for doing so were: "I guess I just was excited and didn't pay it (the badge) any mind" (Tr. 99), and "I guess it was just impulse" (Tr. 107). These answers constituted no defense to the charge, and appellant's suggestion that the trial court unfairly commented on the evidence by calling attention to his testimonial admissions is absurd.[3] If all the testimony given by a defendant happens to be favorable to the prosecution, he cannot complain that the trial court's comments upon that testimony unfairly weighted the charge against him. Certainly the requirement that the charge to the jury be evenly balanced does not mean that the trial court must refrain from all comment on the evidence. Nor can it mean that the trial court must instruct on a theory of defense not supported or even suggested by the evidence.

---

[3] The single comment which appellant finds objectionable was as follows: "The officer has testified that he showed the defendant his badge, and the defendant admits this." (Tr. 145).

CONCLUSION

WHEREFORE, it is respectfully submitted that this appeal be dismissed as frivolous or, in the alternative, that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS, JR.,
ANTHONY A. LAPHAM,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE 1963—715952/P.O.545

REPLY BRIEF OF APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,085

FRED L. SCOTT, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Robert J. Corber
Steptoe & Johnson
1100 Shoreham Building
Washington 5, D. C.

Attorney for Appellant
Appointed by this Court

Questions Presented

In the opinion of appellant, the questions presented by this appeal are:

1. In a prosecution for robbery in which the Government agrees that appellant's testimony, if believed, would mean that the article allegedly taken was not in the "immediate actual possession" of the complaining witness, was an instruction to the jury correct when it failed to comply with the instruction approved by this Court in Spencer v. United States, 73 App. D.C. 98, 116 F.2d 801 (1941) in that it did not define "immediate actual possession" in terms of the reach of the person and made no distinctions between constructive and actual possession or between direct and indirect physical control.

2. Is an instruction implying that appellant's testimony is less worthy of belief than that of other witnesses because of the greater interest of a defendant in the outcome of the trial, correct and without prejudice to defendant.

INDEX

TABLE OF CASES

STATUTES, RULES

D. C. Code, Section 22-2901
D. C. Code, Section 22-505(a)

Rule 52(b), Federal Rules of Criminal Procedure

---

*Cases chiefly relied upon are marked with asterisks.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18,085

Fred L. Scott, Appellant

v.

United States of America, Appellee

Appeal from Judgment of the
United States District Court for the
District of Columbia

Preliminary Statement

This is an appeal from a judgment of conviction for robbery (22 D.C. Code 2901) and assault on a police officer (22 D.C. Code 505(a)). Briefs for Appellant and Appellee have been filed. This is in reply to the Brief for Appellee.

The Appellee has made two arguments requiring a reply. Thus, Appellee argues that the trial court's instruction defining "immediate actual possession" as an "area within which the complaining witness could reasonably be expected to exercise some physical control over the pocketbook," is supported by this court's decision in Spencer v. United States, 73 App.

D.C. 98, 116 F.2d 801 (1941). Appellee further argues that the Court correctly charged the jury that Appellant's testimony should be weighted less than the complaining witness or the police officer because of the relatively greater personal interest of the defendant (Appellant) in the outcome of the trial. We shall show that both of these arguments are erroneous.

Summary of Argument

In Spencer v. United States, supra, this Court approved a specific instruction defining "immediate actual possession" to refer to property on the person, or within the reach of the person, so that the victim of a taking would be in a position effectively to seek recovery from the wrongdoer. The trial court did not give this instruction. Instead it relied upon one sentence of the Spencer case in which the court framed a legal conclusion of the ultimate meaning of "immediate actual possession" without putting it in terms of a jury instruction. Moreover, the definition employed by the Court made no distinction between constructive and actual possession or between direct physical control and indirect control, contrary to judicially approved forms for instructions defining possession.

The Court's charge on the interest of witnesses and the effect interest has on the determination of credibility implied that Appellant's testimony was to receive less weight than other witnesses because of the greater interest of Appellant

in the outcome of the trial. The Court could properly tell the jury that the defendant in a criminal case has a deep personal interest in the case which should be considered in the jury's determination of the credibility of defendant's testimony. However, the Court could not imply that Appellant's testimony was less worthy than other witnesses without invading the jury's province over fact determinations and without infringing upon the presumption of innocence to which Appellant was entitled. The Court's instruction was error.

ARGUMENT

Appellant's Objections On Appeal Involve Plain Errors Affecting Substantial Rights And May Be Noticed Whether Or Not Raised Below

Rule 52(b) of the Federal Rules of Criminal Procedure, providing that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court," is applicable to this case. The serious offenses of robbery and assaulting a policeman are involved. The errors assigned by Appellant are plain and affect substantial rights. Under these circumstances, this Court has always reviewed assignments of error irrespective of whether they were raised in the court below. See, Tatum v. United States, 88 App. D.C. 386, 190 F.2d 612, 614-15 (1951); McDonald v. United States, 109 App. D.C. 98, 284 F.2d 232 (1960).

The Trial Court's Instruction On "Immediate Actual Possession" Is Not Supported By Spencer v. United States, supra. (See Tr. 90, 65, 57, 36, 140-141).

In defining the term "immediate actual possession" from the robbery statute (22 D.C. Code 2901) the Court abstracted one sentence out of the context of the decision of this Court in Spencer v. United States, supra. The Court stated it was relying on Spencer (Tr. 140) when it defined this term in these words:

> "It refers to an area within which the complaining witness could reascnably be expected to exercise some physical control over the pocketbook." (Tr. 141)

The Appellee contends the Spencer case justifies the instruction (Brief for Appellee, p. 9).

In point of fact this Court in Spencer approved an altogether different instruction from the one given by the trial court in this case. The instruction approved in Spencer is quoted in the opinion as follows:

> "* * * 'immediate actual possession meant that the thing taken may be on the person, or within reach of the person, so long as it is considered to be in such possession that if the complainant knew that his property was being removed from his clothes such knowledge would likely result in physical violence or a struggle for possession of the property." (116 F.2d at 802).

Thus, emphasis was placed on the "reach" of the person in possession of the property. If the property is "within reach

of the person" it is in the immediate actual possession of the person.

In this case this distinction is important to the determination of whether Appellant was guilty of robbery, if there was a taking, or the lesser offense of petit larceny. The Appellee agrees that if Appellant's testimony is believed the pocketbook was so far from the complaining witness (distance between witness chair and counsel table, Tr. 140-141) as to be outside her immediate actual possession (Brief for Appellee, p. 8). The Appellee's evidence was conflicting, placing the bag from "two full steps" (Tr. 65) to within easy reach of the complaining witness (Tr. 45-46, 55, 57).

Under these circumstances the question of immediate actual possession was basic and defendant was entitled to a clear and unambiguous definition of the term. By hinging the definition on "some physical control" the Court enabled the jury to believe Appellant and still find "immediate actual possession". The jury could have believed that indirect control through the agency of the clerk-policeman standing behind the counter near the bag would be sufficient or that the ability of the complaining witness to keep the bag within view while running toward Appellant or calling for the help of others would satisfy the definition. In failing to point out the need for direct physical control (e.g., that the bag was within the reach of the complaining witness) the Court slipped into an ambiguous

definition which was misleading to the jury. This is error; "a conviction ought not to rest on an equivocal direction to the jury on a basic issue." Bollenback v. United States, 326 U. S. 607, 613 (1946).

In Suggested Forms for Use In Criminal Cases, 20 FRD 231, 278, the following instruction on possession is recommended:

> "The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.
>
> "A person who, although not in actual possession, knowingly has the power at a given time to exercise dominion or control over a thing, is then in constructive possession of it. ***" (Emphasis added).

This form has received judicial approval. See Johnson v. United States, 270 F.2d 721 (9 Cir., 1959); Erwing v. United States, 296 F.2d 320 (9 Cir., 1961).

Although it is not contended that the Court should have instructed in the precise language of this form, its instruction nevertheless should have recognized the basic elements of possession set out in the form. Constructive possession should be distinguished from actual possession and indirect control should be separated from direct ccntrcl. The specific instruction approved by the Court in the Spencer case reflects these distinctions in different language. As a minimum the Court should have used the language approved in that case with appropriate adaptations to the evidence in this case.

The Instruction By The Trial Court That Appellant's Testimony Was Entitled To Lesser Weight Than Other Witnesses Is Not Warranted By The Authorities

The objectionable part of the Court's charge in respect to the effect of interest on the credibility of witnesses is that "when a witness has a deep personal interest in the outcome of the case, which is true of the defendant, and in a lesser degree true of the police officer and the complaining witness, the temptation is sometimes strong to color and pervert and distort the facts."[1/] The vice of this instruction is that it necessarily casts Appellant's testimony in a mold of falsehood. It says that Appellant's testimony is entitled to less weight than the other witnesses and, since there was a conflict in testimony, Appellant cannot be believed over the other witnesses. See, Strader v. United States, 72 F.2d 593 (10 Cir., 1934). The error of this type of instruction was explained in Reagan v. United States, 157 U. S. 301 (1895), where the Court said:

> "* * * the court is not at liberty to charge the jury directly or indirectly that the defendant is to be disbelieved because he is a defendant, for that would practically take away the benefit which the law grants when it gives him the privilege of being a witness." (157 U.S. at 310, emphasis added).

The Reagan case recognizes the rule that a court may properly remind the jury of the deep personal interest of defendant

---

1/ Tr. 137, emphasis added.

and that this interest should be considered in weighing his testimony. There is no question that the rule is applicable in this case, but it was misapplied by the Court.

The rule was reviewed in this jurisdiction in Fulton v. United States, 45 App. D.C. 27 (1916). The defendant was convicted of embezzlement. The trial court gave the defendant's interest instruction and failed to mention the interest of the prosecuting witness. On appeal, this was held error, the Court saying:

> "And yet the jury in effect were given to understand that the defendant was the only witness who had a deep personal interest in the result of the trial. Grant that his interest was greater than that of any other witness, he should not have been singled out as the only witness whose testimony deserved close scrutiny. If something more than a general caution was demanded, the attention of the jury should also have been drawn to the interest of the witness Smith [prosecuting witness]" (45 App. D.C. at 49-50).

The Court's reference to the fact that the defendant's interest is greater than other witnesses does not mean that the jury should reduce the weight of the testimony pro tanto in comparison with other witnesses. Indeed, the Court's criticism of the failure to comment on the prosecuting witness' interest indicates that no implied or express comparisons are to be drawn. The failure to mention the prosecuting witness in Fulton, when considered in connection with the comments on the defendant's interest, improperly implied that defendant's testimony was less worthy than the testimony of the prosecuting witness.

It is not the province of the courts to decide what weight or effect to give the interest of witnesses on their testimony. Any comments of this nature are improper even though it is not intended to invade the responsibilities of the jury or disparage any witness. See, Hunter v. United States, 62 F.2d 217 (5 Cir., 1932); Williams v. United States, 93 F.2d 685 (9 Cir., 1937).

In Hicks v. United States, 150 U. S. 442 (1893), the Court held it reversible error to instruct that the defendant's interest would "weigh against [his] statements" in comparing the conflicting "statements of the other witnesses who are telling the truth". Declaring that this improperly assumed the other witnesses in the case were telling the truth and, to the extent of any conflict with defendant's testimony, the defendant was not being truthful, the Court said:

> "* * * It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and, perhaps, a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person. Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, given a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall, at his own

> request, but not otherwise, be a competent witness.' The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law." (150 U. S. at 452).

The application of these principles is well illustrated by Strader v. United States, 72 F.2d 593 (10 Cir., 1934). The trial court instructed the jury that a federal narcotics agent had nothing to gain by giving false testimony against the defendant and that, therefore, his testimony was entitled to the same weight as other witnesses. The court added the defendant's interest instruction. Finding reversible error, the Court said:

> "This instruction went an arrow's flight beyond the permitted bounds of fair and helpful analysis of the evidence or comment upon it as an aid to the jury in arriving at a just verdict. It singled out the testimony of the agent and told the jury that there was no motive for him to testify falsely, and that there was such a motive on the part of appellant, and it was intimated in a pointed way that for such reasons false testimony might be expected from him. That was argumentative and prejudiced."

In this case it was proper for the court to instruct the jury that defendant had a deep personal interest in the trial and that the other witnesses also had personal interests which could affect the truth of testimony given. But it was error to imply that defendant's testimony was entitled to less weight than the other witnesses because of defendant's greater personal interest. This inevitably pointed to the conclusion that defendant's testimony was not credible when it conflicted with

the other witnesses. This was an invasion of the province of the jury to determine the credibility of witnesses and it deprived appellant of the full benefit of the presumption of innocence.

CONCLUSION

The trial court incorrectly defined "immediate actual possession" for the jury and prejudiced Appellant by erroneously implying his testimony was less worthy of belief than less interested witnesses. Accordingly the judgment of conviction should be reversed and a new trial ordered.

Respectfully submitted,

Robert J. Corber
Steptoe & Johnson
1100 Shoreham Building
Washington 5, D. C.

Attorney for Appellant
Appointed by this Court

APPELLANT'S PETITION FOR REHEARING

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,085

FRED L. SCOTT, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Robert J. Corber
Steptoe & Johnson
1100 Shoreham Building
Washington 5, D. C.

Attorney for Appellant
Appointed by this Court

Questions Presented on Rehearing

1. Should a trial court, in a trial upon an indictment of robbery, define the phrase "immediate actual possession" as set forth in 22 D. C. Code 2901 in such a way as to distinguish constructive possession from actual possession by referring to the reach of the complaining witness where the evidence was conflicting as to whether the purse (in which appellant admittedly placed his hand with the intent to remove valuables) was beyond the reach of the complaining witness and, therefore, outside her immediate actual possession.

2. Is it reversible error for the trial court to compare the interest of the appellant (defendant below) in the outcome of the trial with the interest of the complaining witness and the police officer witness testifying against appellant when instructing the jury on the credibility of witnesses, thus indicating that appellant is less worthy of belief than other witnesses by reason of his status as an accused.

3. Did the trial court commit error by stating to the jury in a trial upon an indictment for assaulting a police officer, that appellant admitted the officer identified himself, without also stating that appellant testified the officer did not identify himself until sometime after the struggle between them commenced, thus leading the jury to disregard the defense of excuse or justification for resisting an officer by reason of lack of knowledge that he was a police officer until it was too late to discontinue the struggle.

INDEX

TABLE OF CASES

---

*Cases chiefly relied upon are marked with asterisks.

STATUTES

D. C. Code, Section 22-2901
D. C. Code, Section 22-505(a)

RULES, MISCELLANEOUS

Rule 52(b), Federal Rules of Criminal Procedure

Suggested Forms for Use In Criminal Cases,
20 FRD 231, 278

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,085

Fred L. Scott, Appellant

v.

United States of America, Appellee

Appeal from Judgment of the
United States District Court for the
District of Columbia

Appellant's Petition For Rehearing

The appellant respectfully petitions this Court for rehearing on the Court's per curiam affirmance of the District Court judgment. The per curiam order of this Court was issued January 20, 1964.

Summary of Grounds For Rehearing

It is respectfully submitted that the Court has erred in affirming a District Court judgment erroneously based on instructions to the jury which systematically and effectively

foreclosed consideration of appellant's evidence, showing the following grounds:

1. It was error to affirm the District Court's erroneous instruction to the jury on the meaning of "immediate actual possession" as that phrase is used in the robbery statute, 22 D. C. Code 2901 -- an instruction which, contrary to ~~procedure~~ precedent and logic, failed to tell the jury that the article taken must have been in the actual possession of the complaining witness as distinguished from constructive possession, and that there must have been direct physical control, as distinguished from indirect control, by the complaining witness. This erroneous instruction enabled the jury to convict appellant of robbery rather than larceny even if they believed appellant's testimony that the purse of the complaining witness was outside her reach at the time of the taking.

2. The Court erred in approving the District Court's instruction to the jury on the comparative interests of appellant, the complaining witness and the police officer in the outcome of the trial, because the instruction erroneously led the jury to believe that appellant's testimony should receive less weight than the testimony of other witnesses by reason of the fact that he was a defendant. The erroneous instruction deprived appellant of the presumption of innocence and was a judicial invasion of the jury's exclusive right to determine the credibility of witnesses, including appellant.

3. The Court erred in not reversing the lower court judgment of conviction for assaulting a police officer; the trial court erroneously commented to the jury that appellant admitted the police officer identified himself and failed to add that appellant testified that the officer did not identify himself until sometime after the struggle between them commenced. The trial court thereby deprived appellant of any consideration by the jury of the defense that his resistance of the police officer was excusable and justified because he was not aware of the officer's identity until it was too late to stop the struggle.

Statement of Case

The appellant was convicted below of robbery under 22 D. C. Code 2901 and of assaulting a police officer in violation of 22 D. C. Code 505(a). He appealed the judgment of conviction to this Court. After briefing and argument this Court, per Judges Washington, Miller and McGowan, rendered a per curiam affirmance of the judgment of conviction.

The evidence in the trial court showed that the complaining witness (Mrs. Chaimas) laid a large bag on a counter in the camera department of Hecht's Department Store after making a purchase. While the clerk - a police officer working at Hecht's during his hours off as a policeman - was on the telephone checking the credit of Mrs. Chaimas, she turned away

to look at another display counter. The appellant then reached into the bag with the intent to remove valuables.

Appellant testified that Mrs. Chaimas stepped away from the bag a distance from the witness chair to the counsel table in the trial courtroom - a distance in excess of 10 feet. The complaining witness, on the other hand, testified that although she "stepped back" to look at another display counter the purse or bag was always within an arm's reach. The police officer said at the preliminary hearing that she was two steps away and, at the trial, that she was "a foot and a half" away. Mrs. Chaimas did not see appellant near her purse until she heard the police officer challenge appellant. She then turned around to see what appellant was doing.

The appellee has agreed on page 8 of its brief in this Court that if appellant's testimony were believed the jury could have found that the purse or bag was outside the "immediate actual possession" of Mrs. Chaimas. In that event, the conviction would have been for larceny rather than the more serious offense of robbery.

The police officer and Mrs. Chaimas testified that appellant had removed articles from the bag. Appellant denied this.

He was discovered with one hand in the purse by the policeman-clerk and a struggle ensued. The struggle progressed from the counter, across the floor, through a revolving door and out into the street where appellant was subdued. The

policeman and the complaining witness testified that the policeman showed his police badge and identified himself as a policeman when he first confronted appellant at the counter. Appellant testified that he was not shown the badge and was not informed of the identity of the officer until they reached the revolving door.

The Trial Court Erroneously Instructed The Jury On The Meaning Of "Immediate Actual Possession"

The trial court instructed the jury that "immediate actual possession" means "an area within which the complaining witness could reasonably be expected to exercise some physical control over the pocketbook". (Tr. 141, 142). There was absolutely no reference to the reach of the complaining witness, the necessity for actual possession rather than constructive possession or that actual possession means "direct physical control" and not indirect control. As a consequence of the Court's instruction, the jury could have believed it sufficient if the complaining witness was within sight, running or shouting distance of the purse, i.e., had constructive possession of the purse. In other words, it could have believed the appellant and still found that the purse was within the immediate actual possession of Mrs. Chaimas. This was error which seriously prejudiced the appellant.

In Spencer v. United States, 73 App. D. C. 98, 116 F.2d 801 (1941), which the trial court stated it was relying upon (Tr. 140), this Court approved the following specific trial court instruction:

> "* * * 'immediate actual possession' meant that the thing taken may be on the person, or within reach of the person, so long as it is considered to be in such possession that if the complainant knew that his property was being removed from his clothes such knowledge would likely result in physical violence or a struggle for possession of the property." (116 F.2d at 802).

The trial court did not give this instruction. Nor did it undertake to define the meaning of possession. In Suggested Forms for Use In Criminal Cases, 20 FRD 231, 278, a form of instruction on "possession" is recommended as follows:

> "The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.
>
> "A person who, although not in actual possession, knowingly has the power at a given time to exercise dominion or control over a thing is then in constructive possession of it * * *." (Emphasis added).

This form has been judicially approved. See, Johnson v. United States, 270 F.2d 721 (9 Cir., 1959); Erwing v. United States, 296 F.2d 320 (9 Cir., 1961).

The instruction given by the Court in this case would not have excluded from the statute the foregoing definition of constructive possession. If Mrs. Chaimas could have exercised dominion or control over her purse by running after it or by

calling for help or in some other way she would have possession, but it would not be the kind contemplated by the statute. To come within 22 D. C. Code 2901 it must be "immediate actual possession" and this must mean direct physical control, i.e., subject to the reach of the victim of the taking. Failure to give an instruction containing these distinctions was error which prejudiced appellant by enabling the jury to believe his testimony and still find him guilty of robbery rather than larceny.

Possession is an element of statutory robbery and the trial court had the obligation to give a definition of the term. In Kenion v. Gill, 81 App. D. C. 96, 155 F.2d 176, 179 (1946), this Court said:

> "It is reversible error for the trial court to fail to define the various crimes involved in the indictment, and to fail to define the elements of each, to the extent necessary to permit the jury to apply the law to the facts." (Emphasis added).

See, also, Jefferson v. United States, 309 F.2d 380 (9 Cir., 1962); Johnson v. United States, supra; Erwing v. United States, supra. This rule is applicable to a capital case even if proper instructions were not requested in the trial court. Williams v. United States, 76 App. D. C. 299, 131 F.2d 21 (1942); McDonald v. United States, 109 App. D. C. 98, 284 F.2d 232 (1960).

The trial court made absolutely no effort to define possession as an element of the crime of robbery. It simply lifted one

sentence from this Court's opinion in Spencer v. United States, supra, in which after approving the specific instruction there involved and after saying that "immediate actual possession" means something more than "the person", the Court said:

> "It therefore must mean at least an area within which the victim could reasonably be expected to exercise some physical control over his property." (116 F.2d at 802).

That sentence could never have been intended by the Court for use as a substitute for the usual instruction to the jury. It was simply an ultimate statement of a basic principle the Court applied in reviewing the correctness of the trial court's specific instruction to the jury.

In Spencer the complaining witness was induced by defendant and a companion to go with them to a room where he had intercourse with the companion. While so engaged the defendant removed a wallet from his trousers on a chair at the foot of the bed. Holding this to be immediate actual possession, the Court said:

> "Here the taking was within a very few feet of the victim, in the same room, and where had he known of it, he could have made effective efforts to retain his property." (116 F.2d at 802).

In the case at bar the appellant's testimony is that the complaining witness was several steps away from the purse and that it was clearly outside her reach. The case is thus different from Spencer and, as appellee agrees, if the jury believed appellant it could have found that the purse was not in the immediate actual possession of the complaining witness.

Moreover, if Spencer was ever intended to mean that the robbery statute includes the taking of articles beyond the reach or direct physical control of the victim, it has been superseded by this Court's recent decision in Hunt v. United States, ___ App. D. C. ___, 316 F.2d 652 (1963). In that case the complaining witness was jostled while standing with 20 to 25 people at a bus stop. After getting on the bus she noticed her purse open and her wallet missing. She looked out the window and saw the defendants shaking hands. Alighting from the bus she obtained the help of police who apprehended defendants. They were found with money from the wallet on their persons. This Court reversed a conviction for robbery, holding that the case should have gone to the jury solely on the question of larceny, saying:

> "The jury should not have been allowed to speculate as to whether the wallet was picked from Mrs. Ali's purse or whether it dropped to the ground in the jostling of the crowd. * * *
>
> "* * * At the very least there is substantial evidence to support the inference that the defendants picked up Mrs. Ali's wallet, knowing it was hers, and failed to return it to her, having opportunity so to do. This is larceny." (316 F.2d at 655).

This is the orthodox view of immediate actual possession. If the wallet had dropped to the ground it was not within the direct physical control or within the reach of the victim and its taking could not have been robbery.

In this case the trial court should have defined immediate actual possession in terms of the reach of the complaining witness and in terms of direct physical control. The distinction between actual possession and constructive possession should have been noted. For if the appellant were believed there was no actual possession by the complaining witness. It was error to allow the jury to believe appellant's testimony on the distance Mrs. Chaimas was from her purse and still find him guilty of robbery.

The Direct Comparison of Appellant's Interest In The Outcome of The Trial With Other Witnesses Was Reversible Error

The trial court compared appellant's interest in the outcome of the trial with other witnesses in its instruction to the jury on the credibility of witnesses. Thus, the Court said that "when a witness has a deep personal interest in the outcome of the case, which is true of the defendant, and in a lesser degree true of the police officer and the complaining witness, the temptation is sometimes strong to color and pervert and distort the facts." (Tr. 137, emphasis added).

It is proper for the Court to point out to the jury that the defendant has a deep personal interest in the trial which could affect his credibility; and it can refer to the personal interests of other witnesses. Reagan v. United States, 157 U. S. 301 (1895); Fulton v. United States, 45 App. D. C. 27 (1916).

However, it is error to compare the relative interests of defendants and other witnesses because the inevitable effect is to lead the jury to believe that defendants are, simply by reason of being defendants, to be disbelieved if their testimony conflicts with other witnesses. Williams v. United States, 93 F.2d 685, 694 (9 Cir., 1937); Strader v. United States, 72 F.2d 589, 593 (10 Cir., 1934); Hicks v. United States, 150 U. S. 442, 452 (1893); Fulton v. United States, supra.

In Williams v. United States, supra, 93 F.2d 685, there was a conviction for fraud in using the mails to sell stock in a corporation in a case in which the trial court gave a general instruction on the defendant's personal interest and then compared that interest with the interest of a CPA witness ("Cassidy") in connection with the conflict in their testimony. Holding the trial court's comparisons reversible error, the reviewing Court said:

> "It was clearly reversible error for the learned District Judge, after already having given the general instruction as to the defendant's interest in the case, to refer to it again in connection with the comparison with Cassidy's interest therein." (93 F.2d at 694; Emphasis added).

The comparison made by the trial court in this case is the same, in effect, as the one made by the Court in the Williams case.

The appellee has relied upon the Supreme Court's decision in Reagan v. United States, supra, to support the instruction in this case. The Supreme Court said in that case that:

> "* * * The Court may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credibility that shall be given to his testimony." (157 U.S. 310).

However, at no place in the Reagan proceedings was there a comparison of the relative interests of witnesses. The instruction in that case was that:

> "Where the witness has a direct personal interest in the result of the suit the temptation is strong to color, pervert or withhold the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of belief."

The Court carefully pointed out that any instruction which would have the effect of causing the jury to disbelieve a defendant because he is the accused would be erroneous, saying:

> "* * * the court is not at liberty to charge the jury directly or indirectly that the defendant is to be disbelieved because he is a defendant, for that would practically take away the benefit which the law grants when it gives him the privilege of being a witness." (157 U.S. at 310).

Any instruction which has the effect of directly or indirectly comparing defendant's credibility with other witnesses' credibility by reason of their relative interests is erroneous.

Thus, in Fulton v. United States, supra, the failure to advise the jury of the personal interest of a prosecuting witness in an embezzlement case, after instructing on the deep personal interest of the defendant, was condemned as indicating that the defendant was the only one with a reason for giving false testimony. The Court said:

> "And yet the jury in effect were given to understand that the defendant was the only witness who had a deep personal interest in the result of the trial. Grant that his interest was greater than that of any other witness, he should not have been singled out as the only witness whose testimony deserved close scrutiny. If something more than a general caution was demanded, the attention of the jury should also have been drawn to the interest of the witness Smith [prosecuting witness]." (45 App. D. C. at 49-50).

It should be observed that although the mention of the defendant's interest requires reference to the interests of other witnesses, it does not require a comparison of their interests. See Williams v. United States, supra, 93 F.2d 685, 694. Any instruction which places defendant at a disadvantage in credibility with other witnesses, solely by reason of his interest as a defendant, is erroneous whether it be by direct comparison of interests or by indirect comparison resulting from the failure to refer to the personal interests of other witnesses or by improper reference to the interests of other witnesses.

In Strader v. United States, supra, it was held reversible error in a prosecution for illegal possession of narcotics to instruct that a federal narcotics agent testifying against the

accused had nothing to gain by giving false testimony and that the defendant had a deep personal interest which could cause him to distort. The reviewing court referred to the trial court's instruction as follows:

> "It singled out the testimony of the agent and told the jury that there was no motive for him to testify falsely, and that there was such a motive on the part of appellant, and it was intimated in a pointed way that for such reasons false testimony might be expected from him. That was argumentative and prejudicial." (72 F.2d at 593).

Similarly, in Hicks v. United States, supra, the United States Supreme Court held it erroneous to instruct the jury that the defendant's interest would "weigh against [his] statements" when comparing the contradictory "statements of the other witnesses who are telling the truth". The Court said this improperly assumed the other witnesses were telling the truth and that, to the extent of conflict with defendant, the latter could not be believed.

The error in a comparison of interests of witnesses is that it tells the jury that because the defendant is an accused with a deeper interest than others he cannot be believed over others who contradict his testimony. As the Court said in Hicks:

> "* * * It must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, given [sic] a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability." (150 U.S. at 452).

These decisions mean that the trial court may properly refer to the deep personal interest of a defendant. The Court may, further, refer to the interests of other witnesses. But, in all cases, the Court should not in any way compare defendants' interest with other witnesses. To do so is to suggest to the jury that defendants' testimony is not as worthy of belief as other witnesses. This deprives defendant of his right to testify in his own behalf, infringes upon the presumption of innocence to which he is entitled and invades the jury's province of determining the credibility of witnesses.

The comparison of interests in this case led the jury to believe it could not credit the testimony of appellant where it conflicted with the testimony of Mrs. Chaimas and the police officer because appellant had a deeper motive to falsify than the other witnesses. This was prejudicial error.

The Trial Court's Comment On Evidence Relating To Assault On Police Officer Erroneously Deprived Appellant of Defense of Justification

22 D. C. Code 505(a) makes it an offense to assault a police officer "without justifiable and excusable cause". As the trial court said, "if the defendant [appellant] did not know that he was a police officer or did not have that fact brought home to him, he would not be guilty of assault on a police officer." (Tr. 145).

Thus, if appellant was not made aware of the fact that the policeman who struggled with him was a police officer, his resistance would be "justifiable and excusable". Although the police officer testified that he identified himself to appellant as an officer of the police when they first confronted one another at the counter, appellant testified that he was not made aware of the identity of the officer until they reached the revolving door after having struggled from the counter to the door (Tr. 98-99). The jury could well have found on the basis of this evidence that appellant was not aware that he was struggling with a police officer until he reached the revolving door and that it was then not possible to disengage himself for surrender. The appellant did in fact surrender after he and the officer struggled through the door out onto the street.

The trial court, however, foreclosed any such consideration of the evidence when it told the jury that -----

> "The officer has testified that he showed the defendant his badge, and the defendant admits this." (Tr. 145).

The Court did not go on to explain that defendant admitted this only with respect to identification at the revolving door, well after the struggle had commenced.

It is settled that if the trial judge comments on the evidence, as he has a right to do, he should mention the evidence favoring a defendant as well as that which is unfavorable. Hunter v.

United States, 62 F.2d 217 (5 Cir., 1932); Prezi v. United States, 62 A.2d 196 (D.C. Mun. App., 1948). In the Hunter case it was said that:

> "If the trial judge comments on the evidence, as he has a right to do, he should call attention to the evidence in favor of as well as that against the accused. O'Shaughnessy v. United States, (CCA) 17 F.2d 225. That the district judge did not intend to be unfair is beside the question." (62 F.2d at 220).

Obviously the trial court did not intend to be unfair. But this makes no difference. The practical effect of the Court's comment was to inform the jury that the appellee had established its case for assault of a police officer. This was error. The jury should have been allowed to consider appellant's testimony that he was not aware of the police officer's identity until they reached the revolving door. If the struggle had, in the jury's view, then reached the point where it was not possible to disengage, it could have found appellant excused and justified in struggling with the officer. The Court's comment on the evidence precluded this type of consideration by the jury and thus denied appellant a defense to this count of the indictment.

CONCLUSION

The trial court erred in its instruction to the jury on the meaning of "immediate actual possession" as that term is employed in the robbery statute. As a consequence appellant was

necessarily convicted of robbery rather than larceny.

The trial court further erred in comparing appellant's interest in the outcome of the trial with the interests of other witnesses. This deprived appellant of the presumption of innocence and invaded the fact finding functions of the jury by leading them to disbelieve appellant's testimony where it conflicted with the other witnesses.

The failure to call the jury's attention to appellant's testimony tending to excuse him from the accusation of assaulting a police officer, after commenting on the evidence in such a way as to suggest that appellant had admitted the offense was error.

These are plain errors affecting substantial rights and under Rule 52(b) of the Federal Rule of Civil Procedure should be considered by this Court whether or not they were raised below.

This Court has erred by affirming the District Court without opinion. There should be a rehearing and a reversal of the District Court judgment with a new trial.

Respectfully submitted,

/s/ Robert J. Corber
1100 Shoreham Building
Washington 5, D. C.

Attorney for Appellant
Appointed by this Court

CERTIFICATE OF COUNSEL

I, Robert J. Corber, appointed by this Court as counsel for appellant, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

/s/ Robert J. Corber

February 4, 1964